SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 368

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", G. P. PUTNAM'S SONS (INTERVENOR), APPELLANTS,

vs.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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[fol. 1]

IN THE SUPERIOR COURT WITHIN AND FOR THE COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS

No. 82126 Eq.

EDWARD W. BROOKE, Attorney General,

v.

A BOOK NAMED, "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" (COMMONLY KNOWN AS FANNY HILL).

PETITION—Filed February 10, 1964

Respectfully represents your petitioner, Edward W. Brooke, of Newton, in the County of Middlesex, and Commonwealth of Massachusetts, that he is the Attorney General of Massachusetts; that there is reasonable cause to believe that a book named "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill) is being imported, sold, loaned, or distributed in the Commonwealth; and that said book is obscene, indecent and impure; that the name of the publisher and copyright holder of said book is G.P. Putnam's Sons of the City of New York, and the author is John Cleland.

Wherefore, your petitioner prays

1. that an order of notice issue directed against said book named "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill) and of all persons interested in the publication, sale, loan, or distribution thereof, [fol. 2] and to the publisher, copyright holder and author thereof as required by law to show cause why said book should not be judicially determined to be obscene, indecent and impure.

2. that this Honorable Court make an interlocutory finding and adjudicate that said book is obscene, indecent and impure.

3. that this Honorable Court enter a final decree adjudging said book to be obscene, indecent and impure.

4. for such other and further relief as appears mete and just in the premises.

Edward W. Brooke, Attorney General, By: Walter Jay Skinner, Assistant Attorney General.

OPINION OF JUSTICE OF SUPERIOR COURT THAT THERE IS REASONABLE CAUSE TO BELIEVE THAT A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" (COMMONLY KNOWN AS FANNY HILL), IS OBSCENE, INDECENT AND IMPURE AND ORDER FOR ISSUANCE OF ORDER OF NOTICE—Entered February 10, 1964

Upon the filing of the Petition of Honorable Edward W. Brooke, Attorney General of the said Commonwealth adjudicating that the book named "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill), which Petition is incorporated herein by reference, I, Eugene A. Hudson, a Justice of the Superior Court of said Commonwealth, in accordance with the provisions of General Laws, Chapter 272, Section 28C as amended, examining [fol. 3] said book (marked "A") by reading and studying its entire contents and I am of the opinion that there is a reasonable cause to believe that such book is obscene, indecent and impure, therefore, it is Ordered that an Order of Notice issue returnable on Thursday, March 19, 1964, directed against said book named "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill), and addressed to all persons interested in the publication, sale, loan or distribution thereof, to show cause why said book should not be judicially determined to be obscene, indecent or impure.

Said Order of Notice should be given by publication once each week for three (3) successive weeks in a daily newspaper, published in the City of Boston, and a copy of said Order of Notice shall be sent by Registered Mail to the Publisher and copyright holder of said book whose name appears on said book as G. P. Putnam's Sons of the City of New York, fourteen days at least before said return day of the Order of Notice.

Eugene A. Hudson, Justice of the Superior Court.

ORDER OF NOTICE DIRECTED AGAINST A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" (COMMONLY KNOWN AS FANNY HILL)—Entered February 10, 1964

To All Persons Interested in the Publication, Sale, Loan or Distribution of a Book Named, "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" (commonly known as Fanny Hill):

Whereas a Petition in Equity has been begun in our Superior Court for the County of Suffolk reading as follows:

[fol. 4] "PETITION

Respectfully represents your petitioner, Edward W. Brooke, of Newton, in the County of Middlesex, and Commonwealth of Massachusetts, that he is the Attorney General of Massachusetts; that there is reasonable cause to believe that a book named "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill) and marked Ex. A is being imported, sold, loaned, or distributed in the Commonwealth; and that said book is obscene, indecent and impure; that the name of the publisher and copyright holder of said book is G. P. Putnam's Sons of the City of New York, and the author is John Cleland.

Wherefore, your petitioner prays

1. that an order of notice issue directed against said book named "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill) and of all persons interested in the publication, sale, loan or distribution thereof, and to the publisher, copyright holder and author thereof as required by law to show cause why said book should not be judicially determined to be obscene, indecent and impure.

2. that this Honorable Court make an interlocutory finding and adjudicate that said book is obscene, indecent and impure.

3. that this Honorable Court enter a final decree adjudging said book to be obscene, indecent and impure.

4. for such other and further relief as appears meet and just in the premises.

EDWARD W. BROOKE
Attorney General

By: WALTER JAY SKINNER
WALTER JAY SKINNER
Assistant Attorney General"

And on February 10, 1964, Hon. Eugene A. Hudson, a Justice of the Superior Court filed a statement, as appears [fol. 5] in the files of said case, that he had examined said book as required by G. L. Chapter 272, s. 28C and was of opinion that there is reasonable cause to believe that said book is obscene, indecent or impure: And ordered the issuance of this order of notice.

Now therefore, We Command You that on the nineteenth day of March, 1964, which day is the return day of this order of notice, you appear and show cause, if any you have, why said book should not be judicially determined to be obscene, indecent or impure.

Hereof fail not, at your peril, as otherwise said petition may be adjudged and orders and decrees entered in your absence.

And it is ordered that the petitioner shall serve this notice by the publication thereof once each week for three successive weeks in a daily newspaper, published in the City of Boston, and by sending by registered mail a copy thereof to the Publisher and copyright holder of said book whose name appears on said book as G. P. Putnam's Sons of the City of New York, fourteen days at least before said return day of the Order of Notice.

By the Court, (Hudson, J.), Francis P. Concannon, Assistant Clerk.

MOTION OF ATTORNEY GENERAL FOR AN INTERLOCUTORY FINDING AND ADJUDICATION

Now comes Edward W. Brooke, Attorney General of the Commonwealth of Massachusetts, and moves that this Honorable Court make an interlocutory finding and adjudication that said book "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill) is obscene, indecent and impure.

Edward W. Brooke, Attorney General, By: Walter Jay Skinner, Assistant Attorney General.

February 10, 1964, Filed and allowed. (Hudson, J.)

[fol. 6]

INTERLOCUTORY FINDING AND ADJUDICATION— Entered February 10, 1964

This cause came on to be heard at this sitting upon the Motion of the Attorney General, and after issuance of an Order of Notice, in accordance with the provisions of G. L. Ch. 272, Section 28C as amended by Chap. 278 Section 1 of Acts of 1945, and after hearing thereon the Court makes an Interlocutory Finding and Adjudication that the book, "John Cleland's Memoirs of a Woman of Pleasure" (Commonly known as Fanny Hill), (marked Ex. A) is obscene, indecent and impure.

By the Court, (Hudson, J.), Francis P. Concannon, Assistant Clerk.

ANSWER OF G. P. PUTNAM'S SONS, INTERVENER—
Filed March 19, 1964

Now comes G. P. Putnam's Sons, a New York corporation, hereinafter referred to as the intervener, and answers the petition in this case as follows:

1. The intervener admits that Edward W. Brooke is the Attorney General of Massachusetts, that the book against which this proceeding is brought was on or about the date of the filing of this petition imported, sold and distributed in the Commonwealth, that the intervener is the publisher and holder of the copyright of said book, and (further answering) that it is interested in the sale, loan or distribution of said book, and that John Cleland is the author of said book.

2. The intervener denies that said book is obscene, indecent or impure, and further answering says that:

A. The sale and distribution of said book is protected by the First Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment; [fol. 7] and the application of G.L. Chapter 272, Sections 28 C-H, if it results in an adjudication that said book is obscene, indecent or impure, is unconstitutional under the First and Fourteenth Amendments to United States Constitution. An adjudication, the effect of which would be to impede or prevent the sale or distribution of said book, would be an unconstitutional deprivation of rights guaranteed to the intervener by the said First and Fourteenth Amendments to the United States Constitution.

B. An actual controversy exists between the Attorney General and the intervener because the Attorney General intends to suppress the sale and distribution of said book, and such suppression will result in loss and damage to the intervener and its customers. The adjudication which the Attorney General seeks will impede and prevent the sale and distribution of said book, and the interlocutory adjudication heretofore made in these proceedings has already had this effect. Such adjudication and the interlocu-

tory adjudication heretofore made will result, and such interlocutory adjudication has already resulted, in loss and damage to the intervener and its customers.

Wherefore, the intervener prays that this Court

1. Adjudicate, pursuant to G.L. Chapter 272, Sections 28 C-H, that the book against which this proceeding is brought is not obscene, indecent or impure.

2. Enter a decree, pursuant to Chapter 231A of the General Laws, declaring that the sale and distribution of said book is protected by the First Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment; that the application by the Attorney General of G.L. Chapter 272, Sections 28 C-H, if it results in an adjudication that said book is obscene, indecent or impure, or any other attempt by the Attorney General to suppress the sale or distribution of said book, is unconstitutional under the First and Fourteenth Amendments to the United States Constitution; and that any adjudication, the effect of which would be to impede or prevent the sale or distribution of said book, would be an unconstitutional deprivation of rights guaranteed to the intervener by the First and Fourteenth Amendments to the United States Constitution.

[fol. 8] 3. Grant such other and further relief to the intervener as may be appropriate.

G. P. Putnam's Sons, By its attorneys, Reuben Goodman, Charles Rembar.

Attest: Francis P. Concannon, Ass't. Clerk.

REQUEST FOR REPORT OF EVIDENCE AND DESIGNATION OF STENOGRAPHER—May 27, 1964, Filed and Allowed by the Court. (Macaulay, J.)

Now comes G. P. Putnam's Sons Intervener and requests that the evidence in the above-entitled case be reported to the full court of the Supreme Judicial Court and that a

stenographer be designated and sworn by this Honorable Court for such purpose.

By its attorneys, Reuben Goodman, Charles Rembar.

Attest: Albert F. Henneberry, Ass't. Clerk.

[fol. 9] In the above entitled case, at the hearing of the same it is ordered by the presiding justice (Macaulay, J.) that Mary H. Kevill be, and she hereby is, designated to report the testimony in said case, to the Supreme Judicial Court.

Attest: Albert F. Henneberry, Asst. Clerk.

May 27, 1964.

[fol. 10]

Transcript of Testimony—May 27, 1964

APPEARANCES:

John E. Sullivan, Esq., Assistant Attorney General, for the petitioner;

Charles Rembar, Esq., and Reuben Goodman, Esq., for the intervener, G. P. Putnam Publishing Company.

[fol. 11]

COLLOQUY BETWEEN COURT AND COUNSEL RE EXHIBIT A

The Court: At the opening of the case, there was a bench conference, at which time Mr. Charles Rembar of New York was given leave to try the case in behalf of the intervener, and he has filed his appearance.

Mr. Goodman: May the stenographer be appointed commissioner to take testimony?

The Court: The request for a commissioner is granted and the stenographer is authorized to take testimony.

Mr. Goodman: I have drafted an order that she be appointed to take testimony.

The Court: I don't think it is necessary.

Mr. Sullivan: There is a stipulation of counsel that this is the same book that was in issue before Judge Hudson.

The Court: Why can't that book go in as Exhibit A?

Mr. Rembar: No reason why it shouldn't.

The Court: Do you want to see if it is the right one?

Mr. Goodman: The hard cover and paperback are identical. They both have the same introduction.

The Court: That couldn't be because in the foreword of this book here, it gives some history about New York litigation after the hard cover book came out.

Mr. Rembar: What I meant was that everything that is in the hard cover is in here, and this has the additional comment.

The Court: That may be marked Exhibit A.

[fol. 12] (Paperback book entitled, "Fanny Hill, John Cleland's Memoirs of a Woman of Pleasure," is marked Exhibit A.)

Mr. Rembar: Some of my witnesses have been reading this edition and some have been reading the hard cover. Will the references be the same?

Mr. Sullivan: I have never seen the hard cover book, so I can only assume and take your statement that it is, except for the introduction, the same book.

Mr. Goodman: It is, Mr. Sullivan.

Mr. Sullivan: On that condition, that it is the same book, saving the introduction, I will not object on that ground.

Mr. Rembar: Saving the introduction which deals with the New York litigation. The Peter Quennell introduction is in both books.

Mr. Goodman: Would you like us to submit a copy of the hard cover?

The Court: I don't try cases. I would merely like to observe, however, that I have read fully the brief that was submitted last night, and I did read a passage in there wherein the intervener asks that the whole book, including the foreword and this Mr. Quennell's comment, be considered in determining the issues in this case.

Mr. Rembar: Yes, we do ask that, your Honor, and, so far as that is concerned, the hard cover and the paperback are identical. This is the book in evidence.

The Court: With the exception of this history of the New York litigation?

Mr. Rembar: Yes, sir.

[fol. 13] JOHN E. COLLINS, Sworn.

Direct examination.

By Mr. Sullivan:

Q. Would you give the Court your full name, please?

A. John E. Collins.

Q. Your residential address?

A. 157 Stratford Street, West Roxbury.

Q. How are you presently engaged, Dr. Collins?

A. I am Headmaster of the Newman Preparatory School.

Q. How long have you served in that capacity?

A. Four months.

Q. Would you give the Court your educational background, starting from the secondary school?

A. I graduated from Boston College in 1925 with a B.A. degree. I have a Master of Arts degree from Boston University, 1926. I have a Doctor of Philosophy degree from Boston College, 1936. I did graduate work at Harvard and at Oxford.

Q. How have you been employed since the completion of your education or during your education?

A. I was a classroom teacher at the Boston Latin School for twenty-two years. I was head of the English Department at the State College at Boston for sixteen years, as well as dean, academic dean and dean of the graduate school, until February 1st of this year, when I came to Newman Preparatory School. My area is English literature.

Q. In connection with your profession, have you lectured?

A. That has been my life.

Q. Prepared articles?

A. Yes.

Q. Contributed articles?

A. Yes.

Q. Have you read the book commonly called "Fanny Hill"?

A. Yes, sir.

[fol. 14] Q. In your opinion, is this book obscene, Doctor?

Mr. Rembar: If I may, your Honor, I object to that question. It calls for a conclusion of law. It deals with the ultimate determination that this Court must make, and it is not the subject of testimony.

The Court: You don't object as to his qualifications?

Mr. Rembar: I don't know what he has been qualified for, your Honor. I object to his qualifications insofar as they may be thought to make him an expert on matters of law.

The Court: What do you offer him for?

Mr. Sullivan: For his literary expert opinion. I have no basis of this gentleman knowing the law.

Mr. Rembar: The last question, it seems to me, is not a question which deals with the literary merits, or lack of merit, in this book. The word "obscene", as your Honor knows, is a legal concept, a constitutional concept. The opinions of the United States Supreme Court and the opinion of the Supreme Judicial Court of this state in the Tropic of Cancer case have made that very clear.

The Court: I can recognize that the legal concept of what obscene means is one thing; however, a concept of what obscene means in literature has some bearing on determining what the legal concept of obscene means.

I will allow him to answer.

Mr. Rembar: May I have an exception, your Honor?

The Court: Exception noted.

Q. I will repeat the question, Doctor. In your opinion, is the book commonly known as "Fanny Hill" obscene?

A. Yes.

[fol. 15] Q. In your opinion, is the book indecent?

A. Yes.

Mr. Rembar: I make the same objection to that question, your Honor.

The Court: I take it as a motion to strike the answer. The motion to strike is denied and your exception to it is noted.

Mr. Rembar: Thank you.

Q. In your opinion, is the book impure, Doctor?

Mr. Rembar: Same objection, your Honor.

The Court: Objection denied.

Mr. Rembar: Exception.

The Court: Exception noted.

Q. You may answer the question.

A. Yes.

Q. Do you have an opinion whether or not this publication appeals to prurient interest?

Mr. Rembar: Same objection, your Honor.

The Court: Objection denied.

Mr. Rembar: Exception.

The Court: You don't object to that, does he have an opinion?

Mr. Sullivan: I am only asking whether he has an opinion.

The Court: That would be just Yes or No, whether he has an opinion.

Mr. Rembar: That's correct.

[fol. 16] The Court: You may answer. Do you have an opinion?

Q. You may answer if you have an opinion.

A. You are asking me the difference between good and bad?

Q. I am asking you whether or not this publication would arouse prurient interest in a person or persons who read it?

Mr. Rembar: This is not "Have you an opinion?"

The Court: That is a different question than the one you asked before. The question before was, "Do you have an opinion whether this book has prurient interest," pru-

rient character, or something like that. That can be answered Yes or No. Has he an opinion?

Q. Do you have an opinion?

A. Yes.

Q. In the light of the fact that you do have an opinion, would you kindly state to the Court your opinion on whether or not this publication would arouse prurient interest in a reader or readers of this book?

Mr. Rembar: Objection, your Honor.

The Court: Objection denied.

Mr. Rembar: Exception.

The Court: Exception noted.

A. My subjective opinion, unconditionally, yes.

Q. You have recited that you have been in the literary field for some twenty-two years, Doctor?

A. More than that.

Q. More than that. Do you have an opinion whether or not this book has any literary merit?

A. I have an opinion.

Q. Would you give the Court that opinion?

A. It lacks literary merit.

[fol. 17] Q. Do you have an opinion whether or not this publication has any social importance?

A. I would have to make a speech to answer that.

Q. Well, first of all, Yes or No?

A. Yes, I have an opinion.

Q. What is that opinion, Doctor?

A. Well, when I read the book, I attempted to judge it merely from the point of view of a human document, somewhat like "Nana" or "Sister Carrie", but I couldn't find that it had any social significance nor any literary style that might lift it up beyond pornography.

Q. You said the word "pornography"?

A. Yes, sir.

Q. Do you have an opinion whether or not this book is pornographic?

A. Yes.

Q. What is that opinion, Doctor?
A. It is pornographic.

Mr. Rembar: I object to that, your Honor.
The Court: Objection denied.
Mr. Rembar: Same reason. Exception.
The Court: Exception noted.

Q. Are you familiar with the phrase, "hard core pornography"?
A. To a degree.
Q. To the degree that you are familiar with the phrase, would you classify this publication within hard core pornography?

Mr. Rembar: Same objection, your Honor.

A. In my opinion,—

The Court: Just a moment.
Of course, that term "hard core pornography" you took out of the decision of the Supreme Judicial Court.
[fol. 18] Mr. Rembar: By the same token, your Honor, the term "a prurient interest" is taken out of the Supreme Court decision.
The Court: "Prurient" is a word of many years', hundreds of years', usage. I will allow him to answer.
Exception noted.
The Witness: May I have the question again?

Q. The question is, in view of your familiarity within certain bounds of the term "hard core pornography," is this book in your opinion within the bounds of your understanding of that phrase?
A. Yes.
Q. Did you find the book offensive, Doctor?
A. Yes.
Q. Would you go so far as to say you found the book patently offensive?

Mr. Rembar: I object to that question, your Honor. There again, there is a precise legal formula developed

by the United States Supreme Court to express a legal conclusion, in the case of Manual Enterprises.

The Court: I know, but aside from the legal definition of "patently offensive", it might be a literary definition of it, or understanding. In that sense, I think the question is admissible.

I will allow it.

Mr. Rembar: Exception.

The Court: Exception noted.

Q. You may answer the question.

A. Yes.

Mr. Sullivan: Your witness, gentlemen.

[fol. 19] Cross examination.

By Mr. Rembar:

Q. Is it "Doctor"?

A. Yes.

Q. Dr. Connors?

A. Collins.

Q. Doctor, could you tell me what the Newman school is? I am a stranger here.

A. It is a preparatory school for boys.

Q. Is it denominational?

A. It is run by Catholic laymen.

Mr. Sullivan: I object and ask the answer be stricken.

The Court: Objection denied.

Q. If I heard you correctly, you said you had been Headmaster for a matter of four months?

A. Correct.

Q. Do you teach at the school?

A. No, sir.

Q. Had you been a teacher before you became Headmaster?

A. Where?

Q. Anywhere.

A. Yes.

Q. What courses did you teach?

A. Well, the English novel; comparative study of the novel; contemporary novel; three courses in Shakespeare; a course in biography—do you want a list of them all? I could go on forever if you want. I have been around a long time.

Q. Are you familiar with the English novels of the 18th century?

A. Yes, sir.

Q. Which of the 18th century novelists do you rate highest?

A. I don't rate any of them highest. I could give you five or ten names. I refuse to put one as supreme above twenty others.

Q. Would you name two or three that you regard as outstanding?

A. Richardson, Fielding, Jane Austen, Defoe, if you [fol. 20] want to call him a novelist—I presume that's where you are building, anyway; and Smollett and Sterne, Edgeworth Fanny Burning. Go ahead.

Q. You testified in answer to a question put over my objection that you regard the book which is in issue here as appealing to prurient interest?

A. That's correct, sir.

Q. What do you understand by the word "prurient"?

A. Do you want to try Webster?

Q. I want to know what you had in mind when you answered the question.

A. Well, I can start with the word "dirty". I can go on with the word "sexual"; I can go on with "esoteric".

Q. Esoteric?

A. Yes. I can add "erotic", in other words, for the purpose of stimulating sexual reactions.

Q. So that if a book could be described as erotic, you would also describe it as prurient?

A. Those words are not synonyms in every case. They may be and they may not be; you have to have a particular incident and a particular case.

Q. Well, could you give me an example of a book that you would regard as predominantly erotic that you would not regard as predominantly prurient?

A. Why, yes. Zola's "Nana".

Q. That book is erotic in the sense that it stimulates a sexual response in the reader, is that what you mean?

A. To a degree, but it has other literary merit. It lifts it up above and beyond the word "prurient".

Q. I see.

A. It is a human document.

Q. Correct me if I am wrong. As I understand what you are saying now, it is that there are books that are erotic in the sense that—

A. Well, now, yes. Certain parts of "The Arabian Nights", for example, may be.

[fol. 21] Q. Certain parts of the Bible?

A. Yes, there are many cases where the words—

Q. The answer was Yes to that?

A. I don't know what the question was.

Q. I said, certain parts of the Bible.

A. Yes. That's an oldie.

Q. But nevertheless true. Well, let me put my question to you again because I am just trying—

A. You are trying to distinguish between the two words, correct?

The Court: Just let him ask the question and you answer it.

Q. I want to know if I am correct in summarizing what you have been saying just now as follows: that there are certain books which you would deem erotic because they stimulate a sexual response in the reader, but which you would not call prurient because they have certain literary merits or literary values?

A. Well, I wouldn't condemn the whole book as erotic. I say there may be passages and parts in it which may be that.

Q. You know you have to consider the book as a whole, so let's say that there is a book that has these passages and

parts which stimulate this sexual response in the reader, but the book also has some literary merit. How do you designate that book?

A. Masterpiece.

Q. You also answered affirmatively to the question whether the book in issue is obscene. How do you define that word?

A. Disgusting.

Q. Obscene equals disgusting?

A. I will go along with that for a while. Go ahead.

Q. You say for a while you will go along with that?

A. Well, if you start refining it, I will have to start refining.

Q. Don't you think we ought to refine these terms? After all, the publication of a book is at stake here.

A. Yes, I understand.

[fol. 22] Q. There are books, of course, and I think you would agree with this—at least I want to know whether you do—that don't treat of sex at all, but which the reader might find repellent or, in your word, disgusting?

Mr. Sullivan: Objection, your Honor.

Mr. Rembar: I am asking if he agrees with this.

Mr. Sullivan: Is this a question?

A. I think the question is a little obscure.

Mr. Sullivan: Is this a narrative or is this an interrogation?

The Witness: I don't understand him.

The Court: I think you better rephrase the question, please.

Q. Do you know of any books that do not deal with sexual subject matter that you could call disgusting?

A. Offhand, I wouldn't say so, no. I don't think that point is at issue, but go ahead.

Q. The judge will decide what points are at issue, but as of now you say that the word disgusting is confined to books that deal with sexual subject matter?

A. For the time being, yes.

Q. And those books you would call obscene?

A. Yes.

Q. Another question to which you answered affirmatively was whether the book at issue is indecent, and I would ask you again what you mean by that word?

A. Well, I would say that it was contrary to public mores, to the customs of the people and the common standards of a given time and a given place.

Q. Tom Paine's "Common Sense", would that fit your definition?

A. I don't think so.

[fol. 23] Q. Another term that was used on direct examination was the term "patently offensive", and you said that this book is patently offensive. Does that have any different meaning from these other words we have been discussing?

A. Well, I believe patently means open, doesn't it?

Q. It means "on the face of it", I think, yes.

A. Offensive—it is merely another way of picturing the same thing. You said that is in a Supreme Court phrase.

Q. In your opinion, is Henry Miller's "Tropic of Cancer" patently offensive?

A. Yes.

Q. Is it indecent?

A. Yes.

Q. Does it appeal to prurient interest?

A. Yes.

Q. Is it obscene?

A. Yes.

Q. When did you read the book in issue last, Dr. Collins?

A. Last night, first and last.

Q. Could you give me a brief recapitulation of the story in the book?

A. Well, I don't see how I could without being patently offensive.

Q. You are in a court of law, Dr. Collins. I am sure you will be excused.

A. Well, autobiography of a girl that comes from the country up to London and gets herself into a brothel and goes through the various adventures of, first of all, Les-

bianism, and with detailed descriptions of sexual actions. That's about all I could find in the book.

Q. Does she ever get out of the brothel?

A. Well, I should say no, she doesn't get out of the problem, no.

Q. Out of the brothel, I said.

A. Oh, yes.

Q. She does. How?

A. Well, originally, she is taken out by one of her customers.

[fol. 24] Q. And what happens then?

A. Well, it goes on the same—

Q. It is not the same. She is out of the brothel now. What does she do?

A. Well, she rides in a coach and so forth and she has various adventures.

Q. Do you recall who it is with whom the heroine has her first sexual encounter?

A. I believe the lady's name is Phoebe, in the very first chapter, as I remember it.

Q. Do you recall at this time that the heroine, correct me if I am wrong, is a very young girl as you said before?

A. Fifteen.

Q. Fifteen. Does she comment on this experience later?

A. She comments on it. One time later she was very grateful to that girl for introducing her to this situation. That's in the early part of the book.

Q. Can you point that out in the book?

A. I haven't got it annotated. I would have to go through the whole book to go after this.

Q. Well, the Court will read the book. It won't be necessary.

A. All right.

The Court: I read the book. Page 16.

The Witness: I took no notes.

Mr. Rembar: Page 16, your Honor, is the page on which the incident occurs. I was asking for a reference supporting Dr. Collins' statement that she is very grateful to this

woman who has taken advantage of her youth. That was the question. I will leave it to your Honor's further examination.

The Court: I recall something; I can't give you the page.

Q. Do you recall, Dr. Collins, that the heroine, thinking back on this incident, refers to it as foolery and resolves to [fol. 25] have no more such experiences in her life?

A. I remember something like that. I don't remember—I couldn't quote it.

Q. How about her first sexual experience with a man? With whom does that take place?

A. Well, some old rake. I don't know whether his name is even in there.

Q. An old rake, you say?

A. An old rake who had—it was not completed, as I remember, on her part.

Q. With whom does she first actually have sexual intercourse?

A. Now, let's see. It was with this young man who rescued her, as it were, from the brothel.

Q. Do you remember his name?

A. No, I don't.

Q. You read the book last night, though?

A. Yes.

Q. Does the book end with Fanny Hill married or unmarried?

A. She was married.

Q. To whom?

A. I don't remember now.

Q. You don't remember?

A. No, not now. I didn't take notes on it.

Q. It didn't impress you, did it, that the man who is her husband at the end of this book is the same young man with whom she had her first sexual experience?

A. Wait a minute. You lost me on that. I think you are right, and that that was supposed to be the moral in it.

Q. The moral in it is considerably more complicated than that.

The Court: Just a moment. Is that a statement, or what is it?

Mr. Rembar: I will withdraw that, your Honor.

The Witness: I tried to find—

[fol. 26] The Court: Just a moment. It was not a question.

Q. You are familiar, are you, Dr. Collins, with The New York Sunday Times Book Review section?

A. Yes.

Q. Do you recall that on Page 2 there is generally a column by J. Donald Adams?

A. Yes.

Q. I would like to ask you whether you agree with this statement by Mr. Adams.

Mr. Sullivan: Objection, your Honor.

Mr. Rembar: I think, your Honor, it is proper cross-examination where a man has given opinion testimony to ask whether he agrees with a published opinion on the same subject.

The Court: It is hearsay, isn't it?

Mr. Rembar: I am merely asking him whether he agrees, besides which, the Supreme Judicial Court, in the Tropic of Cancer case, considered such material admissible and highly relevant.

The Court: I don't think your statement of what appeared in The New York Times is to be considered as evidence. If you just want to test the knowledge of this witness, I will let you ask the question.

Mr. Rembar: I will ask Mr. Sullivan to concede, not the relevance, but the authenticity of this page of The New York Sunday Times Book Review.

Mr. Sullivan: Counsel has gone over this before, your Honor, and I have no objection to the authenticity, that this is a certain page out of The New York Times, but I do wish to enter my objection on its relevancy and materiality.

The Court: Let me see it.

What statement? It is kind of long.

[fol. 27] Mr. Rembar: I was about to read it to the witness.

Shall I point it out to your Honor?

The Court: The whole thing?

Mr. Rembar: Yes.

(The Court reads article silently.)

The Court: This is getting in evidence the opinion of another witness not under oath. I don't think it is proper. It is this witness' opinion of how good Cleland was as a writer, or how bad he was, his belief.

I will exclude it.

Mr. Rembar: May I have an exception, your Honor?

The Court: Exception noted.

Mr. Rembar: In order to save time, I would like to make—

The Court: Offer of proof?

Mr. Rembar: Offer of proof of this and three pieces of documentary evidence as to which I assume the objection of my brother will be the same and the Court's ruling will be the same.

The Court: Of course, what you pointed out was the opinion of somebody else.

Mr. Rembar: Yes, sir.

The Court: You asked that it get in evidence by asking the witness if he agrees with the opinion of that gentleman. I will accept it as an offer of proof, and it may be marked for identification No. 1, offer of proof.

[fol. 28] Mr. Rembar: May I submit a photocopy?

The Court: No objection if it is a photostatic copy?

Mr. Sullivan: No, your Honor.

The Court: The photostatic copy may be received as an offer of proof.

(Photostatic copy of Page 2, The New York Times Book Review, dated July 28, 1963, containing column entitled, "Speaking of Books," by J. Donald Adams, is marked Exhibit 1 for Identification.)

Offer of proof:

Speaking of Books

By J. Donald Adams

Today's column derives from two recent charges of literary obscenity: the first a ruling by the New York State Court of Appeals, by a vote of four to three, describing as "flagrantly obscene" Henry Miller's "Tropic of Cancer"; the second, a similar charge brought by Corporation Counsel Larkin and the district attorneys of the five counties of New York City, against John Cleland's "Memoirs of a Woman of Pleasure," better known to many generations of readers simply as "Fanny Hill." Miller's book led an underground life for 30 years after its publication abroad in 1931; it was not published here until 1961. Cleland's book first appeared in London in 1748 or 1749, and has led a similar life for nearly two centuries. It was first published in this country last spring.

As every reader of current fiction knows, so far as book publication is concerned, the bars are now completely down in the matter of a writer's choice of language. Newspapers and most magazines still exercise, in varying degree, a measure of self-censorship. So do some book publishers, but no four-letter word is banned from publication if the [fol. 29] publisher, whether of newspapers, magazines or books, chooses to pass it. Government censorship enters the picture only when a work is judged to be obscene. In effect, it is not the words which matter, but the intention with which they are used. "Tropic of Cancer" is full of four-letter words, but by a unanimous decision the Supreme Court of California upheld Miller's right to use them because "There is no authority in the court to act as censors of artistic expression."

To my mind, a writer should be free to use any word in the language. Where he uses it, in what circumstances, and how often, are matters on which the ruling must be made by his own taste, or if he has none—as too many writers have not—by his editor, agent, or publisher. The whole

responsibility lies among them, and it is their obligation to exercise it, if official censorship is to be avoided.

So far, the issue seems to be clear-cut. But when we come to the question of what is obscene, the line cannot easily be clearly drawn, if, indeed, it can be drawn at all. There is a strong subjective element here, and what is obscene to you may not be obscene to me. To some persons, certain passages in the Bible are obscene; many schools, wrongly, in my estimation, use expurgated editions of Shakespeare's plays. It is time we were quit of all this Comstockery.

Cleland was not a great writer, but he was a gifted one, and in my belief as much entitled to call himself an artist as Henry Miller. The chief difference between them is that Cleland presented normal sexual relations for what they are—the intensest pleasure man derives from his senses; Miller makes them revolting. I would prefer to have a child of mine read Cleland rather than Miller.

There are, not that it matters, no four-letter words in Cleland. There is characterization which Miller has never achieved; there are sound moral pronouncements, which he has never made. Cleland offers a vivid social picture of his time—overstated at times, to be sure—but which is basically as true as the drawings of his contemporary Hogarth. As Peter Quennel suggests, the book is properly seen as one of the reactions, in an outspoken age, to the sanctimonious, [fol. 30] sentimental and slyly prurient novels of Samuel Richardson, whose "Pamela" provoked Fielding into writing the same story in reverse, "Joseph Andrews"—in which a young man protects his chastity as zealously as Richardson's heroine. Furthermore, Cleland emphasizes the fact that the sex relation, when informed by love, rests on a higher level than when it is a purely animal reflex—a distinction which many of today's novelists decline to make.

So much for Cleland's merits as a writer. And the demerits? He was well aware of the pitfalls waiting for any novelist who writes in explicit terms of physical love—for he says "there is no escaping a repetition of near the same

images, the same figures, with this further inconvenience . . . that the words, joys, ardours, transports, extasies and the rest of those pathetic terms . . . flatten and lose much of their due spirit and energy by the frequency with which they indispensably recur." Many of his pages become wearisome, but one must admit that in stating why they do, he spoke as an artist.

Many of our current writers including Miller, Jones, and O'Hara, might ponder that statement with profit. I agree with Mr. Quennell that Cleland's book "seems to be far less subversive and demoralizing than not a few of its 20th century counterparts," and that in it "we escape the nauseating modern mixture of sexual appetite and criminal violence." I do not deny that "Fanny Hill" can shock some tender sensibilities, but I do not regard it as an *evil* book.

Mr. Rembar: The three other pieces of documentary evidence to which I refer, your Honor, are the October 31, 1963 issue of The New York Review of Books; Page 710 of the New Statesman of November 15, 1963; and a page whose number I do not have, of the issue of TIME Magazine of August 2, 1963, headed "Modern Living".

Mr. Sullivan: May we just take these down, your Honor, so we will have a record?

The Court: Do you have objection to their admission?

Mr. Sullivan: I have, your Honor.

Mr. Rembar: Exactly the same offer and objection.

[fol. 31] The Court: This one in The New York Review is an opinion of a writer concerning the book who is not present in court. It is hearsay. I will exclude it, and to that you take an exception?

Mr. Rembar: Yes, sir.

The Court: That may be marked for identification as part of an offer of proof, No. 2.

(Article entitled, "The Harlot's Progress", by V. S. Pritchett, contained in the October 31, 1963 edition of The New York Review of Books is marked Exhibit 2 for Identification.)

Offer of proof:

The Harlot's Progress

V. S. Pritchett

Memoirs of a Woman of Pleasure by John Cleland. Putnam, 319 pp. $6.00; paperback $.95

Every age gets the pornography it deserves. The people who are now making a fuss about Fanny Hill, John Cleland's *Memoirs of a Woman of Pleasure,* do nothing about the real pornography of today—the incitement to violence, torture, maiming, and killing, often topped up with sexual perversity, which are presented with a sickening kind of pleasurelessness, on the screen of television and cinema and in pulp fiction. It can be suggested (as Havelock Ellis once did) that some kinds of pornography are socially useful; they may allay evil desires by acting as a sort of imaginative distraction. They may lead us away from action into harmless fantasy. Whether this is so or not, the real test is not what the average man thinks; it is the test of artistic merit, and if he is called upon to judge, it is the average of man's duty to find out what artistic merit is. He will find himself considering man's often brilliant exploration of his own imagination. Nothing could be more horrifying and inciting to sadistic action than those terrible pictures of Goya's called "The Fantasies" and "The Disasters of War"; however, one sees, at once that Goya's art transmutes them and places them in that area of our minds where the difficult but indispensable moral and civilizing process can operate. The [fol. 32] same transmuting process can be seen in the treatment of the classical but surely sordid encounter of Leda with the Swan; in the brothel paintings of Toulouse-Lautrec, in the pathos and laughter of Maupassant's "Maison Tellier." I believe one can see it also in that minor amatory exercise, "Memoirs of a Woman of Pleasure". No one is asked to say *how* meritorious an artist is in these matters, but it is essential for the transmutting element to be recognized.

Since 1749 when it was first published in London, many sensible people have thought that "Memoirs of a Woman of Pleasure," usually known as Fanny Hill, had this element. It has its place in the history of literature, not in the history of smut. Smut never lasts. The story is obviously inflaming, but even "Jane Eyre" or "Lorna Doone" inflames. Fanny, a country girl abandoned in London, describes how she enters a select brothel—note the word "select"—and goes into prolonged, detailed descriptions of several kinds of sexual adventure and intercourse. In doing so, however, she never utters an obscene word, rarely descends even to colloquialism, never to the clinical; she indeed writes an elaborate literary language that would do credit to any master of baroque and poetic utterance—shall we say Henry James?—spoken in a drawing room. And it is not shabby baroque. The disconcerting thing about the book—as a piece of "pornography"—is that it has charm. Many have thought the intercourse of the sexes brutal even when blessed by the Church; more refined and indeed naturally sensitive or passionate people have found the very opposite. Fanny belongs to the latter category. She is healthy, warm-blooded, delights in her senses, is unashamed in curiosity, and is distinctly self-aware. She is unrepentant in pleasure or lust; but she truthfully perceives—and this, I believe, without the sort of hyprocrisy that greater writers like Defoe or Richardson insinuated—that she had physical pleasure in lust but physical spiritual pleasure in love. Having made a lot of money in her enforced profession about which, in the true practical spirit of the eighteenth century, she is complacent, she marries her first lover: a success story that can be said to be a smack in the face for Clarissa or Pamela.

No one pretends that John Cleland approaches the range or power of Defoe or Richardson as a novelist. His book is, [fol. 33] on the other hand, the nearest thing we have to an English "Manon Lescaut". But he must be seriously discussed with these writers by the literary critic, for he brings to life an important element in eighteenth-century

morality and feeling. Two influences clearly bear on his mind. The first is accidental. Residence in Smyrna as British Counsel and later in Bombay appears to have removed from Cleland the morally ruthless, brutal, or comic-brutal attitude to sexual life which is so strong in the aggressive Anglo-American traditions. (Charm, tenderness, a concern for manners in love are pronounced in Oriental works like "The Arabian Nights" and, despite the clinical dog-Latin of timid translators, in "The Golden Lotus".) But the strongest influence on Cleland is that concern for the reform of manners which is the most powerful force in the English novel during the eighteenth century.

Part of this spirit of reform was the expression of Puritan ambition or—more accurately—of the beginnings of middle-class respectability; it began under William III who, like most Dutchmen of that time, was appalled by the barbarity of English social life. The other part was directed to polish, elegance, the refinement of sensibility, and making men and women physically clean and conversible. In the end, the former hardened into hypocrisy and the latter into arid artifice and eventually false sentiment. Especially does the spirit of reform, and the social revolution accompanying it, affect the status of women who begin to emerge as the custodians of society and, at last, of their own persons. Defoe's Roxanna becomes a greedy kept mistress, because she is determined to be as free as any merchant and to be as much master of her person and property as any man. Defoe's Moll Flanders, thief and doxy and calculating fornicator, sins for one motive only: to attain respectability. She ends as the first Mrs. Grundy of Virginia. Her morality and remorse—like Mrs. Grundy's—are amiable but suspect. Though frank about their sexual experiences, these ladies take it as it comes and are incapable of describing their inner life.

It was more profitable, as Mr. Peter Quennell says in his excellent introduction, to compare Fanny Hill with Richardson' heroines Pamela or Clarissa; and also to compare Cleland's moral attitude with the Hogarth of "The Harlot's Progress". The moral of Pamela is that lovely woman must

not stoop to folly; if she does, she will miss both respect-[fol. 34] ability and property. The moral of Clarissa is "Better death"; and of Hogarth's pictorial chronicle, that a life of libertinage leads to self-destruction. To these violent and general views, Fielding was the aristocratic objector. It was notorious (a large body of non-Puritan opinion agreed) that a life of pleasure did *not* automatically lead to disaster; that the virtuous Pamela was a sham; and even that Clarissa was one of those peculiar psychological aberrants who are contented with nothing short of rape. Like Fielding (in this way at least), John Cleland holds to the view that manners can be reformed only if one is truthful about private experience and cultivates one's perceptions and good sense. His story may be shallow, but its content, within its limits, is not.

To this attitude Cleland adds his own eccentricity as a writer. He was a bookish Scot with a Celtic bee in his bonnet. He is eccentric to the point of ridicule. It is true he was a down-at-heel Bohemian who wrote his sensational and daring Fanny Hill to make a quick twenty guineas, when he was bankrupt; yet his real interests were esoteric and solemn. His hobby-horse was not sex but philology. He sought to found a universal language and wrote a "Specimen of an Etymological Vocabulary or Essay by means of the Analytic Method, to retrieve the Ancient Celtic."

Mr. Quennell quotes a long passage from this obscure essay, which is dotty but reveals an obsession with the metaphysics of the art of description. Here is a sample of Cleland's groping mind:

> "*If* then, I repeat it, *if* I am not mistaken in this method of analysing words by an individuation of ideas, syllable by syllable, and through every particle that constitutes those ideas . . by means of which the existence of things may be found in their natural records and repositories, words satisfactorily explained so as to convey undeniable truths by implication . . ."

If that particular passage suggests anything it is a fervid preoccupation with metaphor and the associations of words poetic or otherwise—which is not, when one comes to think of it, extraordinary in an eloquent Celt—that inspired the florid and indeed the best passages of sexual description in the book. The evocation of what sexual pleasure is in its [fol. 35] particularity and in the imagination, was his strong point. There he succeeded where better and higher-minded writers—D. H. Lawrence among them—have grotesquely failed. Cleland is good about sex because he is good about words. Elegance, energy and kindness, he conveyed.

The absurdity of Fanny Hill lies here also; where "pornography" does not brutalize, it idealizes. The book is, in this sense, an erotic fantasy—and a male fantasy, at that, put into the mind of a woman. The male organ is phenomenal to the point of absurdity. Cleland is carried away by his sexual daydream. So was Casanova, most of the time, for eroticism is a kind of intoxication. But we must remember that Fanny Hill was a sensational book, written as a sensational counterblast from the point of view of privacy to those who were formulating the new public bourgeois attitude to sex. In one sense Cleland is engagingly feminine; the continual reference to clothes, to furniture, to manners is that. But Cleland has the naive male double view that old whores are hardened and corrupt but that young ones, though on the make, are also rescuable—not by pious interference, but through the experience of love. On the whole, one would guess that Hogarth's view of the bagnio was the correct one; for we notice Cleland is a snob; his brothel is that fantasy, the select brothel with no risk of the eighteenth-century nightmare, the pox; but is odd that Cleland, who was either wrong, exalted, or cynical, should have had a finer and far less gross sexual sensibility than Hogarth—except possibly in one or two gory sadistic metaphors and in the disagreeable flagellation scene. If that disgusts, it at any rate shrewdly exposes the psychological distress of the neurotic.

Fanny Hill may bore one—she admits that an ecstatic story like hers may become tedious because there is nothing so tiring as repeated ecstasy—but she leaves no bad taste. If we don't believe her fairy tale, we believe her feelings. Indeed she conveys the sense of pleasure without guilt. (There, alas, she is no realist.) After the eighteenth century, a book like this could not be written in England. Romantic morality reasserted itself and sexual happiness retired from print into privacy and, indeed, one does not want this private mystery to be exploited or described too often, even by the gifted.

[fol. 36] After publication, the real pornographers got to work on Fanny Hill. The book was pirated. The pirates supplied obscene illustrations. (One set of these by Cruikshank must have been good, but it has been lost.) They dirtied the text, added episodes. The illustrations led to prosecutions. But as a minor fantasy, deluding as a guide to conduct, but respectful of our delight in the body, this half-sly, half-ingenuous manual is an interesting footnote in the history of the English novel. It reminds one of those improper carvings one sometimes finds under the arms of medieval choir stalls. Immodestly the flesh happily persists.

The Court: I exclude this opinion of this book found in the "New Statesman" as purely hearsay, opinion testimony, the author not in the court. Do you except?

Mr. Rembar: Yes, your Honor.

The Court: Exception noted. Do you offer that as an offer of proof?

Mr. Rembar: Yes, your Honor.

The Court: It may be marked Identification No. 3.

(Article entitled "Mersey Sound, 1750", by Brigid Brophy, from the November 15, 1963 issue of "New Statesman", page 710, is marked Exhibit 3 for Identification.)

Offer of Proof:

Mersey Sound, 1750

Brigid Brophy

To my mind, the two most fascinating subjects in the universe are sex and the 18th century. Anyone who so much as partly shares that persuasion would expect "Fanny Hill", as a cardinal source-book for both subjects, to be an interesting document. An interesting novel, however, [fol. 37] you would not expect, if you judged by the run of minor 18th-century fictions or, still less, by the run of famous naughty books. As a rule, if there's anything drearier than smut, it's old smut. When "Fanny Hill" turns out to possess, over and above the interest of its material, literary charm, that seems almost too bonus to be true. It is in fact a highly engaging little erotic tale—perhaps the most engaging emerge from the entire 17 centuries of European literature that lie between "Daphnis and Chloe" and "Claudine a l'Ecole".

Not that there could be an instant's doubt which of the 17 "Fanny Hill" belongs to. Tone, tenor and preoccupations, to say nothing of the heroine's first name, are all so dead-central to the period that it is by an accident of poetical precision that the book was published slap in the centre of the century, in 1750 itself. No more can one doubt that John Cleland's (quite legitimate) purpose was to entertain and get paid for doing so. He neither aims at nor achieves a masterpiece. When he touches art, which is quite often, it is of a truly artless kind; he is not even trying, in the fashion established, soon afterwards by Greuze and towards the end of the century transplanted into literature by Bernardin de Saint-Pierre, to be artless.

That, given the period's wrongheadedness about art and artlessness alike, is to Cleland's advantage. The literary masterpieces of the 18th century were produced against the grain of a philosophy convinced that imagining was less useful than moralising, and often against the grain of the author himself. The century's greatest poet could actually, looking back in admiration to the primitive Golden

Age, count among its glories that it had no arts. Laclos cast "Les Liaisons Dangereuses" in the flippant convention of an erotic novel with a perfunctory punishment of vice appended. The result is that we have only just noticed that it is a great novel, and have still not wholly taken in that it is one which turns its convention upside down—not an erotic but a thanatic novel, whose ending, so far from being an appendage, is the tragic doom towards which the characters unconsciously drive themselves all along. Cleland's talent, quite lacking the stamina of Pope's or Laclos', could never have stood out against the exceptionally marked and uniform grain of his age. Had he at- [fol. 38] tempted high art, he would have got trapped in the marmoreal toga-folds of the 18th century elevated manner. He is saved because, unlike Laclos, he *is* writing an erotic novel. He can skip the elevation and get on with the erections. 'I skip over, Fanny frankly writes, 'the natural grief and affliction which I felt on this melancholy occasion'—that is, 'the loss of my tender fond parents'. Likewise she will 'skip over all that happened to me on the road'—the road, that is, conducting her to London and prostitution from her poor but respectable birthplace near Liverpool.

Cleland's immediate model is "Clarissa", whose final volumes had appeared the year before. He adopts the standard epistolary form, but with no attempt at verisimilitude, let alone at providing a textbook of epistolary etiquette. He simply splits his novel into two 'letters': each is framed in a couple of merely formal, though pretty, colophons in the shape of an introductory 'Madam' and a concluding "I am, Madam, yours, etc." which are addressed to an anonymous friend to whom Fanny has promised an account of 'the loose part of my life, wrote with the same liberty that I led it.' Having tidied away the paraphernalia, Cleland is able to get on with a remarkably uncluttered narrative line; indeed, he gets Fanny to London, and places her, penniless and friendless, at the mercy of a brothel-keeper, in about as many pages as it takes Richardson volumes to get Clarissa into the same fix.

In outline, Fanny's story apes Clarissa's; but where Richardson, a proto-Sade but less frank, presides sanctimoniously over his heroine's long-drawn degradation, Cleland and Fanny are cheerful. The opening discloses the end will be happy, and in fact everything between is arranged in a manner thoroughly agreeable to Fanny. Quickly escaping the nasty procuress, she takes up with—indeed, falls more than a touch in love with—one who is kind, deals fair financially and tenderly suffers her girls to have none but gentle and sexually attractive clients. The most remarkable thing about these 'memoirs of a woman of pleasure' is that the pleasure concerned is Fanny's. She may be bought, but she is no inert bit of goods. Her 'downfall' is really one long delightful swoon into the depths of pleasurable sensation—which Cleland has her describe in vigorous and often beautiful metaphorical language; by her own account, her subject is 'properly the province of poetry, nay, is poetry itself'. The emergence of the 18th-century heroine, explaining herself [fol. 39] in the novel through letters and in the opera through arias, reflects that women had emerged into social articulateness. No longer mere objects of men's pleasures, they can themselves be pleased and say so. A whole public—including the women themselves—was demanding to be told what *did* please women. Cleland's was perhaps the most explicit answer.

True, the century had 'defloration mania', and Cleland caters for it. The parlour game of Fanny's fellow-prostitutes is to swop accounts of how they lost their virginities; and Fanny's own history is a prolonged defloration. It begins at the hands of a prostitute, and proceeds to the loss of her visual innocence when she spies on sexual encounters; even after her first lover deflowers her, it remains for a lover more ithyphallic to enlarge the result; even then, with the help of stage-property blood, Fanny fakes up a maidenhead to have it destroyed all over again by a client whose particularity that is. She undergoes yet another 'initiation'—into a society of four couples who take turns at coupling in front of the others. There fol-

lows Fanny's systematically progressive initiation into variations and perversities; and at the last Cleland still has an ironic conceit up his sleeve whereby Fanny, reunited and about to be married to her first love, comes to bed as blushingly as a virgin, though her blushes are now for her non-virginity.

Yet all these pangs of defloration are in the service of erotic pleasure—Fanny's and the reader's. Postponing the culmination of Fanny's deflowering is equivalent to postponing the point where the reader has a mental orgasm. By fulfilling the requirements of the erotic novel, Cleland produced an article rare in the 18th century, a full-length (which Voltair's are not) prose narrative where the climaxes are cumulative instead of cancelling out. Fanny herself propounds the literary problems: to avoid at once gross language and 'mincing . . . affected circumlocutions'; and to introduce variety into subject-matter 'eternally one and the same'. Surmounting these problems, Cleland arrived at the craft of the well-made novel. It is all the same craft, whether the novel is erotic or non-erotic; and to a large extent it is the same craft as that of the well-[fol. 40] made erotic daydream. Cleland's narrative, in which all inconveniencies—including the very possibility of pregnancy—are simply swept out of consideration, is purest daydream. Its content could not possibly shock anyone who has ever led a fantasy life.

Eighteenth-century philosophy had, like Fanny herself, recognized pleasure as nature's 'principal end'. Cleland is simply practising what Edward Young preached, that 'Pleasure is nought but virtue's gayer name'. Fanny finally opts for virtue in the form of true and singleminded love, but without, as she rightly claims, hypocrisy: she simply finds love ultimately more pleasurable, and wastes no regret on a past which has only the better equipped her, in experience and money, for love.

Her progress is sprigged with the pleasure-motifs of the age. Fanny is Johnsonian in devotion to London, and Evelin-like in contempt for provincials. The story's one

excursion out of town echoes "The Rape of the Lock" in being 'a party of pleasure . . . up the river Thames'. Cleland imports no realistic exoticism from his life in Bombay or as consul in Smyrna. He uses only the fashionably exotic slang of calling a brothel a seraglio. That and the 'ceremonial of initiation' which Fanny undergoes fore-echo Mozart's themes—and even his serious social intent. Like "Die Zauberflote" itself. "Fanny Hill" sketches an ideally benevolent society, albeit in a brothel. Jealousy is drowned in a diffused bi-sexuality; even the constant voyeurism, practised through an implausible quantity of cracked panelling, symptomises an attempt to render sex sociable.

Opera is, as a matter of fact, one of the motifs which Cleland's mind, running so true to the age, leaps at for a metaphor of sexual 'harmony and concert'. The female body he maps according to the great minor art of the age, landscaping. It is to Watteau's landscapes that he casts back when Fanny calls sexual intercourse 'our trip to Cythera'. Indeed, Cleland's couples share with Watteau's a grave elegance and a courteous concern for each other. Even when the four pairs take turns on the couch, 'good manners and politeness were inviolably observ'd'. Cleland himself is as decent. Mercifully *not* 'robust', or Row-[fol. 41] landsonian, he is decorous not merely in vocabulary but down to the last cadence of his fine, plain prose.

Cleland does not achieve the imaginative world of a Watteau or a Tiepolo; his is the fantasy world of a decorative painter. The entire novel might be taking place, like his pleasure-party in a pavilion whose 'marquise' is 'figur'd with fluted pilasters . . . the whole having a gay effect upon the eye, wherever you turn'd it.'

The Court: I will exclude the Time Magazine article. I read that before; you have it in the back of your brief, haven't you?

Mr. Rembar: Yes.

The Court: I will exclude that as the opinion of someone else not in court, and exception noted.

Exception taken, and exception noted.

That may be accepted as Identification 4 in an offer of proof.

(Item bearing sub-heading "Taste" under the heading "Modern Living" from the August 2, 1963 issue of Time Magazine is marked Exhibit No. 4 for Identification.)

Modern Living

Taste

Ye Olde Sex

Just when it was becoming fashionably sick, someone had to come along and remind everybody that sex can be fun. The contemporary five-foot shelf abounds in incest, lewd vagrancy, homosexual hankypanky, reckless driving, and other suburban indelicacies. Such misdemeanors seem thoroughly neurotic compared to the plain if repetitive dalliance of Fanny Hill, heroine of John Cleland's [fol. 42] "Memoirs of a Woman of Pleasure," originally published circa 1749 and widely accredited as the first deliberately dirty novel in English.

Last week in Manhattan, after hearing arguments on two injunctions to ban sale and distribution of the book (in a new edition by G. P. Putnam's Sons), Justice Charles Marks of the New York State Supreme Court ruled that Fanny is indeed obscene.

The United States Supreme Court has held that the test for obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." Said Justice Marks: "The opinions of authors and critics cannot be substituted for those of the average person in the contemporary community. Neither the quality of the writing nor the so-called literary worth of the book prevents the book from being adjudged obscene."

A Patchwork Past. The rough handling in court was not Fanny's first setback. In 1821 a racily illustrated edition won fame up Massachusetts way, in what is generally regarded as the first recorded case in the U.S. of suppression of a literary work on grounds of obscenity. Her

second-class status thus established, poor Fanny found that the boys just wouldn't leave her alone. Like her sister-in-arms, "Lady Chatterley," she has been dog-eared, passed around, pirated, smuggled, disguised in "Franny and Zooey" jackets, and buried under musky sweatshirts in prepschool locker rooms the world over.

Author Cleland, the never-do-well bohemian who first put "Fanny" between covers, wrote the book because he needed money, but sold it for a mere 20 guineas. He thereafter pursued his passion for philology and died a scholar. His publisher, made rich by reprints, died a proper gentleman.

As her story begins, Fanny is a 15-year-old Lancashire lass who arrives in London and promptly falls into the clutches of a sportinghouse madam. Her subsequent adventures are detailed in prose that misses nary an 18th century curlicue. Of one memorable orgy for eight, she [fol. 43] relates: 'It is to be noted that, though all modesty and reserve were banished from the transaction of those pleasures, good manners and politeness were inviolably observed; here was no gross ribaldry, no offensive or rude behavior, ungenerous reproaches to the girls.' After enjoying many another 'well-breath'd youth, hot-mettled, and flush with genial juices,' Fanny finds true love and kisses the oldest profession goodbye.

Enjoying It Less. Perhaps the most damaging case against pornography is stated by Fanny herself: its greatest offense is tedium. She begins her second letter saying: 'I imagined, indeed, that you would have been cloy'd and tired with the uniformity of adventures and expressions, inseparable from a subject of this sort, whose bottom, or groundwork being, in the nature of things, eternally one and the same.'

True enough. But in an age when even serious authors treat the sexual act in terms of a case history or social protest (and the Olympia Press's professional pornographers are driven to exploit De Sadean whips, chains and intricate multiple interlacings to keep ahead of the uncen-

sored press), Fanny Hill's straightforward heterosexuality must come as a shock. None of her escapades, for instance, are as unsavory as the AC-DC boy-meets-boy encounters of James Baldwin's "Another Country," nor are they as grubbily explicit as the climactic sexual passage in Updike's "Rabbit Run."

Certainly Fanny was no common harlot. Her "Memoirs" combine literary grace with a disarming enthusiasm for an activity which is, after all, only human. What is more, she never uses a dirty word.

Mr. Rembar: There is an exception to each of those rulings, I take it?

The Court: One of them you didn't make, but I made it for you. I saved your exceptions; you are protected all around.

Mr. Rembar: I have no further questions of this witness.

The Court: Any further questions of this witness?

[fol. 44] Mr. Sullivan: I have nothing further, your Honor.

That is the petitioner's case, your Honor.

The Court: Petitioner rests.

Mr. Rembar: If the Court please, before I call my witnesses, I would like to make a brief statement.

I objected to the eliciting of testimony on the part of Dr. Collins because, as I contend, the questions asked were all questions that required a legal conclusion in order to be answered. I will not argue that point further. Your Honor has ruled and my brief deals with these matters.

I did not object to the question addressed to Dr. Collins as to whether in his opinion the book has or lacks literary merit. That kind of question—

Mr. Sullivan: May I interrupt, your Honor?

The Court: What is this, an opening?

Mr. Sullivan: Are you opening your own case or—

Mr. Rembar: Yes.

Mr. Sullivan: —or pulling mine apart at this stage?

Mr. Rembar: I beg your pardon?

Mr. Sullivan: I don't quite understand what the point of this is.

Mr. Rembar: I want to distinguish between the type of testimony to which I object and the type to which I do not object.

Mr. Sullivan: Your Honor, please, I believe this is a matter for argument.

[fol. 45] The Court: Yes. This is an opening statement at the conclusion of the petitioner's evidence.

Our practice here is, if you make an opening statement before you present your evidence, it is usually a statement of what you intend to prove and what you intend to show.

Mr. Rembar: I would have arrived at that in the very next sentence, your Honor.

The Court: All right.

Mr. Rembar: The witnesses whom the publisher, as intervener, will call will testify in the main to the issue last described, that is to say, whether the book in issue has or has not literary merit or other social values.

I would point out that in the case of Attorney General vs. A Book Named Tropic of Cancer, the Supreme Judicial Court of this state held that the presence of such merit or other values excludes the possibility that a book can be held obscene.

I call Professor Stocking.

Fred Holly Stocking, Sworn

Direct examination.

By Mr. Rembar:

Q. Would you give your full name, please, sir?

A. Fred Holly Stocking.

Q. What is your occupation, Mr. Stocking?

A. I am Professor of English and Chairman of the English Department, Williams College, Williamstown, Mass.

Q. How long have you been teaching English?

A. Since 1937.

[fol. 46] Q. Have you covered a wide range of English literature?

A. Yes, sir, from—generally, I have taught courses from Chaucer to the 1930's.

Q. Are you familiar with the book in issue in this case?

A. Yes.

Q. Would you please state your opinion about merit or lack of merit in this book?

Mr. Sullivan: Objection, your Honor, to the form of the question. What manner of merit?

Mr. Rembar: I didn't say manner.

The Court: Are you objecting on his qualifications?

Mr. Sullivan: No, to the form of the question.

The Court: All right; qualifications are admitted. First, determine whether he has an opinion on whether this book has any literary merit.

Q. Do you have an opinion, Mr. Stocking, as to whether the book in issue has literary merit or other value?

A. Yes.

Q. Would you state that opinion, please?

A. I think this book has literary merit because, first of all, I think it is a work of art. That is to say, I think it asks for and receives a literary response as distinct from a non-literary response.

I think it is, like all pieces of literature, essentially an act of contemplation, and an act of contemplation presented through a story that is presented in an orderly and organized fashion, with a fictional central character, and with a literary style that is definable and commendable.

I think the central character is presented as a person who, at the time of writing these words, is essentially what I call [fol. 47] an intellectual. By an intellectual, I mean someone who is extremely curious about life and who seeks with objectivity and detachment to record with accuracy the details of the external world, physical sensations, psycho-

logical responses, who makes an attempt to generalize on experience for patterns in experience and to articulate and formulate those patterns, and who likes to, endeavors to, arrive at certain conclusions about experience.

This character is essentially, in my opinion, an empiricist who does arrive at certain conclusions, certain conclusions about moral values, certain conclusions about the nature and high value of temperance, certain conclusions about the value of the life of the mind, who arrives at a clear intellectual distinction between the nature of love and the nature of lust.

The intellectuality of this character is made clear to me from the opening page by the prose style, which is ceremonious, formal, consciously formed, and in a way that I find pleasureable and highly artificial. This establishes the air of detachment from the beginning.

I think furthermore that it is a remarkable piece of imaginative projection. It is extraordinary that a man could project himself into the mind of a woman in as precise and vivid a way as Shakespeare has projected himself into the minds of women and kings and bums and all sorts of personalities which must have been in many ways different from Shakespeare's own.

I find this a structured novel which follows a definitely progressive pattern. I find it a novel which offers that kind of vicarious experience and the conclusions one can derive from vicarious experience which one cannot derive from one's own experience.

Furthermore, with the authority of Mr. Quennell, who is an authority on the 18th century, I find that this tells me things not only about human nature but about the 18th century that I might not otherwise know.

Q. Who is Mr. Quennell?

A. As I understand it, Mr. Quennell is a scholar who has written considerably about the 18th century. I would say [fol. 48] he is a semi-popular writer whose writings are based on very sound scholarship which he wears very lightly.

Q. This is the Mr. Quennell who is the author of the introduction?

A. Yes.

Mr. Rembar: That's all.

Cross examination.

By Mr. Sullivan:

Q. Where were you educated, Doctor?

A. I graduated from Southeastern High School in Detroit. I got my B.A. from Williams College, my M.A. and my Ph. D. in English from the University of Michigan.

Q. How long have you been at Williams as a professor?

A. Since 1940. That is, I was a member of the faculty. Professor isn't the word for that entire time.

Q. Member of the faculty?

A. Yes.

Q. That's what I mean. I am very pleased to meet you. I am sure you are a distinguished scholar.

A. Thank you.

Q. Now, you said "on the very first page of this book." I assume you are not talking about Mr. Quennell's introduction, you are talking about the substance of Cleland's publication?

A. That's true.

Q. You say that the prose style connotes a certain type of character, do you not?

A. That isn't exactly what I said. I said it denotes a character who has achieved a certain capacity for organizing experience, a certain detachment.

Q. That's the character of the author?

A. No, the character of Fanny Hill, who is the speaker as distinct from the author.

Q. The heroine, as Mr. Rembar has described her?

A. Heroine was his pronunciation.

[fol. 49] Q. I am very sorry. What kind of a character did Fanny Hill have, Doctor?

A. At the time she is writing these words, she had a character of a person who has had a great deal of experience, who has lived life with great gusto and with a great interest in it, and is now trying to formulate her experiences in the past.

Q. As portrayed by Mr. Cleland, as he wishes to portray them, is that so?

A. He has her portray herself, yes.

Q. Through the book itself, would you describe Fanny's character for me?

A. I have described it. I will repeat this description, if you like. She is a person who lives with great zest, who is interested in experiences, who is not offered an opportunity to have a very wide range of experiences, but, within the narrow range of experiences that life offers her, she tries to arrive at certain conclusions about life and to make certain generalizations.

Q. She doesn't have the opportunity to have a wide range of experience?

A. Her economic and family circumstances determine this, to a large extent.

Q. What family, Doctor?

A. Family that she didn't have.

Q. Does she have a family?

A. That she didn't have. Her lack of family would be a better phrase.

Q. You have recited that she has had certain experiences and has a zest for life. These experiences, do they include Lesbianism in the book?

A. Yes, an experience with Phoebe. She is an extremely innocent girl at that time. She certainly wouldn't be able to identify it as Lesbian, but we in later age can use this word for that experience.

Q. Do these experiences include sexual intercourse?

A. Indeed they do.

Q. And endless experiences of sexual intercourse?

A. No.

[fol. 50] Q. Within the bounds of the book?

A. There are many points in the book in which she is not engaged in sexual intercourse, but reflecting on her experiences, talking with other girls.

Q. But in reflecting on the experiences, and the explanation of the experiences as they take place, they all involve at that point sexual relationships?

A. No, they do not involve sexual relationships.

Q. When you take out those that do not involve sexual relationships, how many pages of this book do you think you would have left?

A. I would have to go through it and do this.

Mr. Rembar: The book speaks for itself, your Honor, on this. I don't think the witness can be expected to count pages.

Mr. Sullivan: He has said they do not all—

Mr. Rembar: That is his answer.

The Court: I will permit the examination.

A. Do you want me to cite an example of a page that is not about sexual experiences?

Q. No, I will ask the questions.

A. All right.

Q. Is there any depravity in this book, Doctor?

A. Yes, I think there are one or two experiences which, if they occurred in real life, would be regarded by a normal person as depraved, and she learns from both normal, if that's the appropriate contrasting term, experiences and from depraved ones. I think the flagellant episode is the clearest example.

Q. The whipping?

A. The whipping episode.

Q. Is there any homosexuality?

A. There is a reference to a homosexual episode and, in this edition, it is not described in detail.

[fol. 51] Q. It is not? Have you read the paperback or just the hard cover?

A. I understand they are the same. This is the book that I have read (indicating).

Mr. Rembar: They are the same in that regard.
Mr. Sullivan: I have a specific page in mind.

A. I understand that there is a passage that the editors believed a later publisher inserted and therefore was not written by Cleland, but does occur in some 18th century editions of this book.

The Court: We are only interested in this particular book that is in litigation here.
The Witness: The particular episode I have in mind is the one in which Fanny is disgusted by what she sees.
Mr. Sullivan: That is what I have in mind.
The Court: I didn't hear you.
The Witness: I said, the passage I have in mind is the one in which Fanny expressed disgust at what she had seen. The actual episode itself, I said, is not presented in the detail that the other episodes are presented.
Mr. Sullivan: I had for reference, your Honor, a book that Dr. Collins read and it was somewhat different from this.
The Witness: I have only this Putnam edition which you have before you.
Mr. Rembar: 256 and 257 in that book; 181, 182 in that book.
The Court: What is this, a homosexual incident?
The Witness: Would you like to have me read this?

[fol. 52] Q. I would be pleased to have you read it, beginning here.
A. The passage I have in mind:

> "The criminal scene they acted, I had the patience to see to an end, purely that I might gather more facts and certainly against them in my design to do their deserts instance justice; and accordingly, when they had readjusted themselves, and were preparing to go out, burning as I was with rage and indignation, I jumped down from the chair, in order to raise the house upon them, but with such an unlucky impetuosity, that some nail or ruggedness in the floor caught my foot, and flung me on my face with such violence that I fell

senseless on the ground, and must have lain there some time e'er anyone came to my relief; so that they, alarmed, I suppose, by the noise of my fall, had more than the necessary time to make a safe retreat. This they effected, as I learn with a precipitation nobody could account for, till, when come to myself, and compos'd enough to speak, I acquainted those of the house with the whole transaction I had been evidence to."

That was the paragraph I had in mind.

Q. I had in mind this particular one (indicating).

A. "For now the elder began to embrace, to press and kiss the younger, to put his hands into his bosom and give him"—

The Court: Do we need to have this read in? The whole book is in evidence.

Mr. Sullivan: No, we don't, your Honor.

The Court: You just put in the record what particular page you want the Court's attention called to.

Mr. Sullivan: In Exhibit A, it would be at pages 181 and 182, your Honor.

The Court: That is the homosexual incident.

[fol. 53] Q. You earlier stated, Dr. Stocking, that this was a portrayal of an act of contemplation?

A. Yes.

Q. What did you mean by an act of contemplation?

A. Any literary work is an act of contemplation in that a literary person contemplates in terms of character, story, episode, as distinct from a philosopher who contemplates in terms of abstract proposition, the mathematician in terms of mathematical symbol, and so forth.

Q. Is it not true that there are repeated and vivid descriptions of sexual intercourse in this book?

A. That is true.

Q. Would you call those descriptions normal sexual intercourse descriptions?

A. The descriptions are normal descriptions—I want to make sure what you are asking me about—except that this

recorder is more accurate, precise, and orderly than most of us are able to be in our reports.

Q. He is accurate, Doctor?

A. He gives the illusion of accuracy. I don't know how it feels to be a murderer, but when I read what a fellow says about how it feels, I get the illusion of accuracy.

Q. Then it is an illusion of accuracy?

A. Every piece of literature creates an illusion.

Q. There is also in this book depravity, you have stated?

A. There are descriptions of one or two episodes which a person, if he encountered them in real life, would describe as depraved.

Q. And homosexuality?

A. There is a description of an episode, a brief description of an episode of homosexuality.

Q. And Lesbianism?

A. There is a description of something that you and I could recognize as Lesbianism.

Q. Are such descriptions obscene, Doctor, by your definition?

A. By my definition, they are not obscene because they are subordinate to an interest which is primarily literary, [fol. 54] whereas an obscene piece of literature has an interest which is primarily to arouse sexual passion in the reader.

Q. Does not this book give rise to sexual passions in the reader?

A. Individual passages of the Bible, of Shakespeare's plays, and—

Q. I wish you would answer my question.

The Court: Answer the question.

A. Individual passages do, of course.

Q. Percentagewise, in the book itself, what proportion of this book is devoted to depicting sexual relations of one kind or another?

A. I am sorry; I am unable to make a statistical answer.

Q. In your opinion, a rough estimate, Doctor?

A. In my opinion,—

Mr. Rembar: Your Honor, here again, the book is in evidence. I don't see what this witness' estimate of the proportion will add to the facts.

The Court: I will allow the question.

The Witness: Will you state the question again?

The Court: How much of it relates to these incidents and how much does not?

Mr. Rember: I would like an exception, your Honor.

The Court: It is admissible.

Repeat the question to the witness, please.

(Question read by the stenographer.)

[fol. 55] Mr. Rembar: Your Honor, I would like to make an objection on further ground. It is now very well settled that a book must be considered as a whole. It is not permissible to take parts of it, or fractions of it, or individual passages. The question is irrelevant under the present state of the law.

The Court: I deny your objection.

Mr. Rembar: Exception.

The Court: It adds up, and the test is for me to consider the whole, not the witness.

The Witness: Judge, if I may say so, my definition of obscenity is with reference to the whole.

Mr. Sullivan: May the witness answer my question, your Honor?

A. I do not know what proportion.

Q. Could you make an estimate, Doctor? More than half?

A. This is a question of—

Q. Depicting—

A. The subject matter, not the way in which the subject matter is presented; I am just trying to get clear about the question.

Mr. Rembar: Is it understood I have a continuing objection?

The Court: No.

Mr. Rembar: I object to this question.

The Court: The last question, "Is it more than half?" Object to that question?

Mr. Rembar: Same objection.

[fol. 56] The Court: Objection denied.

Mr. Rembar: Exception.

A. My guess would be less than half.

The Court: Less than half?

The Witness: Yes.

Q. Does the depicting of these sexual relations, be they intercourse, homosexuality, Lesbianism, or depravity, in this fashion, in your opinion, arouse prurient interest in the reader?

Mr. Rembar: Objection, your Honor, on the same ground to which I objected to these questions in the plaintiff's case **in chief.**

The Court: You object, that the witness has to have in mind what the legal definition is of prurient interest. Prurient is a word of many years' usage.

This witness can answer the question.

Mr. Rembar: Your Honor, it was a word of many years' usage prior to 1957. In that year, the Supreme Court made it part of a rule of law.

The Court: Just a moment. If you want to take an exception, you may have an exception.

Mr. Rembar: I would like to state a further ground of objection, if your Honor will allow me.

The Court: All right. State it.

Mr. Rembar: This cross-examination goes far beyond the direct examination which was confined to the issue of literary merit.

[fol. 57] The Court: That doesn't go in Massachusetts. He can examine on any issue that may arise in the case.

Objection denied.

Mr. Rembar: Exception.

The Court: Exception noted.

A. Your question was, "Do these episodes presented in this way arouse prurient interest?" By "in this way" you mean in the prose style in which they are presented?

Q. No, just as presented in the book, Doctor.
A. As presented in the book?
Q. The form as presented in the book.
A. As presented in the book. The answer is No. That is not the chief—

Mr. Sullivan: May I ask that be stricken?
The Witness: I will ask for a clarification.
The Court: Whatever it is, it is out.

Q. The depicting of the sexual episodes in this book as presented in the form as set forth in this book, do they arouse a prurient interest in the reader?

Mr. Rembar: Objection, your Honor, on grounds previously stated.
The Court: Objection denied.
Mr. Rembar: Exception.
The Court: Exception noted.

[fol. 58] Q. A Yes or No, Doctor.

The Witness: Judge, I cannot give a Yes or No because it arouses many interests, of which a prurient is—

Q. Would you kindly state that you cannot give a Yes or No answer?
A. I cannot give a Yes or No answer.

The Court: All right. We will take the morning recess.

(Short recess.)

Mr. Sullivan: I have no further questions of this witness, your Honor.

Redirect examination.

By Mr. Rembar:

Q. You were asked on cross-examination about the passage in the book in which Fanny Hill observes a homosexual encounter. What is her attitude toward this? What is her reaction to having seen what she says she saw?

Mr. Sullivan: Objection, your Honor.

The Court: Of course, I have read the whole book, but I will allow the question.

A. Anger and disgust.

Q. There were questions directed to you about certain parts and certain passages of this book, and your opinion of them was asked. What is your impression of the book as a whole?

A. My impression of the book as a whole is that it is essentially trying to be, and is successful in being, a literary work, that is to say, a piece of writing that intends to and succeeds in evoking a literary response.

Mr. Rembar: That's all.

[fol. 59] JOHN M. BULLITT, Sworn.

Direct examination.

By Mr. Rembar:

Q. Would you state your name, please?

A. John M. Bullitt.

Q. What is your position, Mr. Bullitt?

A. I am Professor of English at Harvard and Master of Quincy House.

Q. Do you have any particular specialty within the field of English?

A. Yes, the 18th century is my special field.

Q. Have you read the book in issue?

A. I have.

Q. Do you have an opinion as to its literary merit or other value?

A. Yes.

Q. Would you state it for the Court, please?

A. As clearly as I can, I should say that the book has detectable literary merit and considerable historical value.

Mr. Sullivan: May the last portion be stricken, your Honor? I object to that last.

The Court: It wasn't responsive to the question. It may go out, but you may ask the witness the same question.

Mr. Rembar: I asked whether or not it had literary merit or other value, your Honor. The witness is saying it has historical value as well as literary merit.

Mr. Sullivan: I don't believe he has been qualified as an historian, your Honor.

The Court: Read the last question. I only understood it inquired about literary value.

(Question read by the stenographer.)

[fol. 60] The Court: I will allow the answer to stand.

Q. Will you go on, please?

Mr. Sullivan: Would your Honor note my exception?

The Court: Exception noted. You are excepting to the portion where he says it has historical value?

Mr. Sullivan: Historical value.

A. I don't quite know how far you want me to go. It seems to me that much has already been said with which I would whole-heartedly agree, namely that we have here a book which is—

The Court: Just a moment. We can't take that as evidence.

Mr. Sullivan: May the witness be asked on how far he is to go, your Honor?

The Court: No. By saying he agreed with others cannot be accepted as evidence. That part may go out.

Q. That part is stricken out, but you may state what that opinion is.

A. Yes, all right. This, it seems to me, is a novel which is a deliberate work of art, not, I must say, in my judgment, a great work of art by any means, but recognizable as an effort to interpret a rather complex character living in a world peopled by highly diversified characters, going through a number of very different adventures.

There is evidence, it seems to me, here of a rather skillful, not greatly skillful, but rather skillful effort to construct a recognizable plot with a purpose behind it.

There is, in my view, clear evidence that this book has a good deal of interest as it relates to a number of other books in the 18th century which are concerned with some of the same themes, some of the same points of view.

[fol. 61] As I understand Cleland, he is presenting here a moral situation in which he is affirming certain moral values, certain attitudes. The structure of this affirmation is to set somewhat in opposition the idea of sensual delight on the one hand in opposition to, what shall we call it, prudence, or rationality, on the other.

This is a theme which was common in the 18th century. It underlies "Joseph Andrews" of Henry Fielding; it is a theme which is part of the moral structure of Richardson's "Clarissa" and "Pamela", and so on, very commonly. Cleland resolves it in a way which is customary among his contemporaries in the 1740's, namely, although she asserts very strongly throughout the novel the value, the importance, of sensual pleasure, she at the same time learns, and the sense of the novel can be construed as the education of a young woman in a moral life, the value of love.

Actually, this learning process begins at the very beginning of the novel until at the end she concludes, first of all, the education with the last of her lovers, the old man who dies, who educates her in a kind of intellectual responsibility, and, finally, she finds her true love in the figure of Charles. Here she asserts during those last pages at some length the whole idea that a sensual passion is only truly experienced when it is associated with the emotion of love.

There is an element of the novel that has not been touched on frequently, which I would like just briefly to mention. In fact, there are two elements. We have not discussed the novel in terms of its comic possibilities.

There is a good deal of comedy in this novel, deliberate, calculated comedy. For example, the metaphoric structure which Fanny uses when she describes her seduction, if I may use that word, by the sailor, is nautical. She falls into purely nautical phraseology. I have forgotten the terms—I have at my desk a list of them, at my seat over there, but if there is any question about it, I can find the passage.

Q. You are referring to the—

A. To the sailor who picks her up.

[fol. 62] Q. —encounter with the sailor?

A. Right. At one point in the novel, she has an affair with a businessman. The metaphor in that case is filled with references to business terms, and so on. This is deliberate, calculated, and is amusing.

The second aspect of the book, it seems to me, that might bear emphasis is the way in which Cleland follows a tradition of descriptive characterization. It may not be an accident that she takes the name "Fanny". It may be that Cleland clearly had the adventures of Joseph Andrews, by Henry Fielding, in mind.

In "Fanny Hill," Fanny is described in great and really quite delightful physical detail. If anyone wishes me to read the passages, I can do so, but the detail of this description very closely parallels the description of Fanny in "Joseph Andrews". So, it is perfectly evident that he is here bringing to his piece of fiction an experience, a literary artistry, which he has learned from one of the great and acknowledged masterpieces in the 18th century.

Another element that I might mention as perhaps an interesting insight into the significance of this book for the period is that the famous French poet, Guillaume Apollinaire, brought out an edition of "Fanny Hill" in the 19th century, a translation of it into French, to which he added a very long introduction, most of which, not in his words, most of which consisting of a transcript of parts of the memoirs of Casanova, and a transcript of a book written in the 18th century which gave an historical account of the seraglios, the bagnios, the brothels, and the famous women who ran them in the 18th century.

This clearly is a piece of rather remarkable social history of interest to anyone who is interested in fiction as a way of understanding society in the past. It is interesting that one of the ladies who is mentioned in this historical account is named Mrs. Cole, who is one of the two rather sharply distinguished madams in the story, and this sharp distinction is a further instance that he is not simply mechanically

grinding out characters, and this Mrs. Cole, of the two, is [fol. 63] the more sympathetic, and she is presented rather sympathetically here in Apollinaire.

Q. You just mentioned, Mr. Bullitt, two characters who are quite distinct in the book. Is there in general the treatment of character and the development of character in this book that is typical of the novel as a literary form?

A. Very much so. Perhaps the proper way to start answering your question is to refer to a critical remark made by Henry Fielding in "Tom Jones."

The Court: No, You can't bring hearsay in there.
The Witness: Sorry.

A. In answer to your question, yes, there are a number of characters. There is Esther Davis, the woman who brings her to London. There are very careful, exuberantly done characterizations. I am trying to find the one of Mrs. Jones, for example, who is described as being about 46 years old, tall, meager, red-haired, with one of those trivial, ordinary faces you meet with everywhere and go about unheeded, unmentioned.

The Court: What page is that?
The Witness: Page 61.

A. There is a rather careful effort here to delineate this person. The early Phoebe, who is "red-faced, fat and in her early 50's, who waddles into a room." She doesn't walk in, she waddles in.

This kind of writing is very skillfully done. It is a mark of an artist.

Mr. Rembar: Thank you; that's all.

[fol. 64] Cross examination.

By Mr. Sullivan:

Q. Earlier, Professor, you used the word "seduction" and then said, "Pardon me for using that term." Why did you say, "Pardon me"?

A. I was trying to recall vividly exactly what went on between Fanny and the sailor.

Q. You didn't know if it was an accurate word to apply to—

A. To apply to that particular scene. I wasn't quite certain. I would have to look again at the opening passage to be sure.

Q. You say there is considerable sensual delight in the book?

A. Yes.

Q. Would you say that those passages that relate to sensual depravity are delightful as well?

A. I don't understand, sir, your question.

Q. First of all, are there depictions of depraved sexual relations in "Fanny Hill"?

A. Depictions?

Q. Depicted.

A. A homosexual scene is depicted.

Q. Would you answer my question Yes or No, are there phrases—

A. Yes.

Q. There are?

A. Yes.

Q. Would you also say they are sensual delight?

A. No. To whom, the reader or to Fanny?

Q. To the reader.

A. To the reader, no.

Q. You also say that Fanny operated in a world of diversified characters?

A. Yes.

Q. Of the characters in the book, how many of the characters are depicted in relation to non-sexual happenings? A rough estimate.

A. May I ask a question?

[fol. 65] Q. Certainly.

A. To clarify your question, do you mean in their total life span given to us, because some of the characters who are involved in sexual exploits have a good deal of other things—

Q. Any time they appear in the book.
A. Any time. Very few, if any.
Q. Very few, if any.

Mr. Rembar: I'm sorry—would you repeat the question, please?

The Court: How many characters in the book were concerned with non-sexual activities.

Mr. Rembar: At any time, was that it, or wholly?

The Witness: At some time.

Q. At some time in the book concerned with non-sexual activities. What was your answer?
A. My answer to that would be No.

Mr. Rembar: I thought he misunderstood.

A. (Continuing) I thought your question—let me give a straight-forward answer. So far as I can recall, every character in the book has, at some time or other, some relation to sexual activity.
Q. That's what I understand you to say. Then you say this book has a plot and a purpose, do you not?
A. A plot, certainly. A purpose, I am not sure I understand you, sir.
Q. I believe you said in direct examination that there is a definite purpose set forth in the book as the author—
A. If I said that, I would revise what I mean. I think that, yes, one purpose here is to write a novel that is going to be of interest to his readers. That is perfectly clear. Beyond that, he does have an idea to present—a purpose in that sense. He is communicating.
[fol. 66] Q. He shows this through characters, does he not?
A. Yes, indeed, through what the characters say.
Q. You have said all these characters at some time or another in the book have some relationship to a depicting of sexual relationships?
A. Yes.
Q. You also said that Fanny was an intellectual person?

A. That, I believe, was not my phrase. It was used by, I believe, a previous witness, but I think that a very good case could be made for that. I wouldn't put her I.Q. at any great height, but intellectual in the sense that this book is written, as it were, at the moment, reflecting back upon a life span of action, and she reflects upon incidents that took place.

Q. It is really only part of a life span, isn't it?

A. Well, it depends—I am not quite sure how old she is right now as she writes it. The book takes her, as I recall, from 15 to 19.

Q. That's right; then she marries Charles?

A. Then she marries, that's right. She has children by him, so she must be an older woman now.

Q. You gather at least some, well, ten or more years after she married Charles?

A. Yes.

Q. I gathered the same.

A. The story then goes up to the conventional termination of most novels, at least in the 18th century, namely, action before marriage, matrimony, and that is the conclusion.

Q. This is only a four-year span of her life?

A. As I recall, yes.

Q. And you testified this was how she depicted her education?

A. Yes. Now, as I recall, she came to London with very little education, her parents having died when she was young.

Q. Smallpox?

A. Smallpox, exactly, and she was innocent, and she attributes falling into vice to ignorance and innocence. This, [fol. 67] again, is a very familiar theme in the 18th century. Hogarth has a whole series of prints on the subject.

Q. I wish you would answer my question.

A. Yes, sorry.

Q. We don't have to get into other books. Incidentally, Doctor, are you here under summons?

A. Under summons?

Q. Yes, were you summoned or asked to be here?
A. I was asked, yes.
Q. And you voluntarily came in?
A. Voluntarily, yes.
Q. Do you believe that the reader of this book would have aroused in him or her prurient interest?
A. What reader?
Q. The average reader in the community to whom this book becomes available.

Mr. Rembar: Your Honor,—

A. Do I have to answer this Yes or No?

Mr. Rembar: —I know your Honor has ruled on this, but I make the same objection.
The Court: Objection denied.
Mr. Rembar: Exception.
The Court: Exception saved.
The Witness: Your Honor, do I have to answer that Yes or No when I find it very difficult? I am no sociologist, your Honor; I am a professor of English.

Q. Let me rephrase it.
A. I am not a sexologist; I am not a professional in this matter.
[fol. 68] Q. Are you familiar with the dictionary term of prurient interest?
A. Based on the Latin term meaning itch.
Q. Would you, upon reading this book, and being a literary expert, which I am sure you are, I am quite impressed with your credentials, feel that the average reader in this community would have aroused in he or she a prurient exercise or interest?

Mr. Rembar: I am sorry—prurient what?
Mr. Sullivan: Well, prurient interest.

A. An interest in prurience, did you mean by that phrase?
Q. Yes.

The Court: I will save your objection and exception. Again, it is the same question.

A. I think it is possible, but I find it incapable, honestly, to be certain.

Q. Well, there is homosexuality in this book, isn't there? A. Oh, yes. Surely no homosexual would be aroused by this.

Q. There is Lesbianism in this book?

A. Yes, and I can't imagine a girl being stimulated to Lesbianism.

Q. And there are depictions of depravity in this book?

A. These are two depictions of two kinds of depravity, yes.

Q. And a good deal of sexual intercourse?

A. Yes.

Q. Is the book obscene in your opinion?

A. I have no opinion on obscenity.

Q. You have no opinion on obscenity. Do you have an opinion on offensiveness?

A. Yes.

Q. Do you feel it is offensive?

A. No.

Mr. Sullivan: I have no further questions.

[fol. 69] Redirect examination.

By Mr. Rembar:

Q. Mr. Bullitt, you were asked whether in this book there is delight in the two scenes of depravity to which reference was made, and you asked whether my brother meant delight on Fanny's part or on the reader's part. What is your answer to each, that is, considering the reader and Fanny?

A. I think in this case we are somewhat influenced by Fanny's own response. Fanny's response is disgust, horror, indignation. She explains very carefully that the only reason she sees the scene to its conclusion is not for any pleasure that she receives in voyeurism, but rather so that she can document the facts so that she can go and get help and to have the people arrested. This is the reason why

she hurries so rapidly, catches her foot on a nail, falls, is knocked unconscious; they hear her and they escape.

Mr. Rembar: No further questions.

Recross examination.

By Mr. Sullivan:

Q. I would like to ask one question. Are you married?
A. I am indeed.
Q. The language used in this book—is this the type of language you would use over the breakfast table with your wife?
A. There isn't a single dirty word in this book.
Q. Would you answe ay question?
A. Yes, indeed; indeed.

Mr. Sullivan: No further questions.

Robert H. Sproat, Sworn.

Direct examination.

By Mr. Rembar:

Q. Would you state your name, please?
A. Robert H. Sproat.
Q. What is your position, Mr. Sproat?
A. I am Associate Professor of English Literature, Boston University.
[fol. 70] Q. How long have you been on the faculty at Boston University?
A. Approximately 17 years.
Q. Have you read the book before the Court?
A. Yes, I have.
Q. Do you have an opinion as to whether it has literary merit or other value?
A. Yes, I do.
Q. Would you please state that opinion for the Court?

A. I think "Fanny Hill" has very definitely literary merit and, as such, I believe it has social value. Having literary merit, I believe it belongs to the history of English literature rather than the history of smut.

It is a novel that, esthetically or artistically, is a unified work of art, having a very interesting structure, even though the division of that structure seems to be in two parts—it is fundamentally in three parts. It bears upon the development of the character of the heroine.

Q. What are those three parts?

A. The first part, up to her meeting with Charles; the second with her experience with, I think it is, Mr. H.; and then, finally, her salvation in love with Charles.

I think each of these sections is intricately or organically related to the character of Fanny, to help develop the heroine's final moral and philosophical values. Now, they aren't very great, I will admit that—they are not profound, but they are legitimate values, and they are positive values.

Q. What are those values?

A. I think that, at the risk of oversimplification, she finds that love, that sex without love, with love, is a good thing.

Q. Would you repeat that sentence?

A. That sex with love is a good thing, that is, a morally good thing, that she is dealing with the opposition, or that Cleland is dealing with the opposition in the novel between sex without love and sex with love.

Now, he agrees, Cleland's point is clear, it seems to me, that sexual, natural sexual expressions or joys, are funda- [fol. 71] mentally good. Unlike Kinsey, I would say that Cleland's attitude is that sex is good qualitatively rather than quantitatively.

Fanny realizes this. I think that the character herself—though Cleland doesn't have the skill that a Fielding has —yet she is a minor, she belongs, it seems to me, to the minor classic heroines, falling someplace, I would say, perhaps between James Joyce's Molly and Moll Flanders.

Q. She forms the link between Moll and Molly?

A. Possibly. I am trying not to repeat what has been said before, but the one aspect, I think, I found interesting

about the work, is the way the language functions in his novel to create a distance, even when the sexual experiences are portrayed, and, I will admit, they are portrayed in detail. That one's response to those scenes is a literary response has been brought out by a previous witness.

One is not unaware of the formal values of the work. I think that one's response is, in part, or, as it is in any work of art, both to what is being said and how it is said at the same time. Very often, I think that this is a saving grace, for many of the scenes, translated into language of the present, realistic, naturalistic, in the language of the realistic, naturalistic novel, could be quite offensive. But I find it not offensive.

Q. So far as these realistic, naturalistic novels of the present are concerned, do you find that they treat sex in as explicit detail as this book does?

Mr. Sullivan: Objection, your Honor.

The Court: I will allow it.

A. I think that in many novels, and John Updike's "Rabbit Run" come to mind, in one particular passage, it is just as explicit, if not even more explicit, a treatment of sex—passages in James Baldwin. Now, I am not saying that they are particularly offensive. Mary McCarthy approaches [fol. 72] it in a more clinical way—I find it more enjoyable, myself, to read John Cleland, though I hate to say this about Mary McCarthy.

The Court: Have you found books with as many repetitive sexual experiences as this book?

The Witness: Well, the episodic nature of this 18th century novel, which often belongs to the genre, makes it almost inevitable that one will have a repetition of the same sort of thing over again. On the other hand, I think that in the case of Baldwin, that the total import of the book rests, at least as I see it, upon all values, all themselves resolved in terms of fundamental sexual relations. In that sense, I would say it has more sex in it, but to answer your question, in a quantitative count, I would say no, probably.

Q. I want to make sure I understand you on what you said about the style as it affects the response of the reader. Would you mind going into that a little bit more?

A. I think one can say that, in the response to a work of art, as perhaps you all know, one cannot separate the form from the content, but, very often, there is a slight emphasis on one over the other. Teachers often teach from the standpoint of content—I find people in comparative literature tend to do this—rather than paying attention to the total work of art, the formal value.

What I found amazing in this book is the style itself, the words, the language, the metaphor—and we do have evidence that Cleland himself was aware of this—and we have a rather eccentric theory of language—I believe Mr. Quennell points this out in the introduction—concerned with language, with metaphorical expression, and one responds to that when one is reading about the sexual, when one is reading the novel, and particularly the sexual episodes. It rescues—put it this way, the language transmutes what might have been, what could be a brutal or raw and directly expressed vulgar situation into something literary.

I don't know if that answers it.

Q. It does.

Mr. Rembar: I have no further questions.

[fol. 73] Cross examination.

By Mr. Sullivan:

Q. A vulgar situation; do you find "Fanny Hill" vulgar at points?

A. I do not find it vulgar, if I know what you mean by vulgar.

Q. Offensive?

A. Offensive, no. I do not find it at all offensive.

Q. You say that this book has some literary merit. I believe you used the phrase "not great" and "not profound."

A. Right.

Q. But some value?

A. Some value.

Q. That value is that sex with love is a good thing.

A. Well, put that way, that is a rather amateur, crude way of putting it, but fundamentally—

Q. I think I wrote down your words.

A. Yes, I know. I am criticizing myself, sir, not you.

Q. Does Fanny love all the characters she has—

A. She doesn't love, but you will notice, I think, if you read it carefully, that she, in every instance except the flagellation episode, has to feel, or wants to feel, some kind of tender feeling, if you will, or have some tender feeling. You will notice that throughout there is much concern with manners; she may find that the man was very mannerly and she admires his manners.

Q. She had no tender feeling when she was trapped, as we are wont to have said earlier, into observing the homosexuality scene.

A. She was outraged by that.

Q. She was angered and disgusted?

A. She was angered. I am trying to say that even in her profession she is constantly reflecting, and this has been brought out before, she is constantly reflecting, she is reflecting upon the manners of people.

Q. If the literary merit that grows out of this novel is that sex with love is a good thing, what purpose can be [fol. 74] served by depicting the homosexual scene? If that is a literary merit that comes out of this book, could not that purpose have been served otherwise?

A. I suppose it could, except that that scene does help to define the character of Fanny. She is a—if I may quote a phrase used with admiration about Mr. H., "He is a rational pleasurist," and she same something of this herself. In other words, I think perhaps one can justify that scene on the grounds that it further develops the character of Fanny.

Q. But it has no particular relationship to the literary merit you draw out of the book, the literary merit that you suggest would be there without the homosexual scene?

A. No. I see what you mean, but I feel a work of art is an organic whole, and if you lop off any part, you destroy the whole.

Q. You feel this is a work of art?
A. Yes, a minor work of art.
Q. Do you also think it is obscene?

Mr. Rembar: Same objection, your Honor.
The Court: Objection denied.
Mr. Rembar: Exception.
The Court: Exception noted.

A. If I should answer that—may I ask a question? If I say No, I don't want to be forced to define "obscene" because I am not sure what you are getting at, but I do not think that—
Q. Supposing—
A. I do not find the book offensive. I do not find the book offensive. I find it erotic.
Q. Would you accept the definition of "obscene" as disgusting to the senses?
A. As disgusting to whom, sir?
[fol. 75] Q. The sense, senses, our senses?
A. Our senses—if that is the definition, I would say it is not obscene.
Q. Do you feel that the book arouses prurient interest in the reader?
A. Well, once again, I do feel that I cannot judge. I am not qualified to judge this matter. This is a matter for a sociologist.
Q. I think that's a very accurate answer. Do you also feel, with regard to the characters in this book, at any given time during the book, that they all have some relationship to the depicting of a sexual relationship of some sort?
A. As I recall, I think yes; yes.
Q. And if we were to remove all the sexual relations out of this book, how much of the book will we have left, proportionately?

Mr. Rembar: Same objection, your Honor. It is the same question.
The Court: Same ruling.
Mr. Rembar: Exception.
The Court: Exception noted.

A. Well, once again, you see, we are involved in this question of the relationship between form and content. The work of art is achieved content. By just taking and extracting something and saying what is left, you have an entirely different work of art.

Q. I know it is difficult, perhaps, because I am sure you are an accomplished literary person, and I respect you for that, but let's try to look at this coldly and factually. On the great number of sexual relationships that are recited in this book—and they are recited quite explicitly, are they not?

A. Are you talking about just the acts that are described or the reflections about the acts, the thoughts?

[fol. 76] Q. Both.

A. Both. If you went through and took all these out—that is what you are saying—presuming we could all agree on what was sexual, whether it was offensively sexual or not—

Q. Just your opinion, not what I would agree on; just what you feel.

A. May I answer that this way, by saying that I would disagree with the former witness who said it was less than fifty percent of the book that deals with sexual matters.

Q. Do you feel it would go as high as seventy-five percent?

A. Well, I am not—

Q. You don't want to beggar the issue?

Mr. Rembar: I repeat the objection.

The Court: He didn't make any answer.

Mr. Sullivan: Thank you very much, Mr. Sproat.

Redirect examination.

By Mr. Rembar:

Q. When you said that the principal value dealt with in the book is sex with love is a good thing, you were speaking in terms of a moral value, were you not, sir?

A. Yes.

Q. There is another sense in which the word value has been used here, and that is literary value, which, I assume,

can consist of many things. So far as literary values go, did you mean to say that that particular moral concept was the only value in the book?

A. Oh, no. I meant that this was value in the sense of a theme in the book—one of the themes, the development of the character, the structure of the plot, the setting, the style, and so forth and so on. There are other themes, in other words, in the novel. This is one of them.

Mr. Rembar: That's all; thank you.

[fol. 77] Norman N. Holland, Sworn.

Direct examination.

By Mr. Rembar:

Q. Would you please state your name and residence address?

A. Norman N. Holland, 196 Appleton Street, Cambridge 38.

Q. What is your position, Mr. Holland?

A. My position?

Q. Yes, your occupation?

A. I am an Associate Professor of English at M.I.T.

Q. Have you read the book in issue?

A. Yes, I have.

Q. Do you have an opinion as to its literary merit or other values?

A. Yes, I do.

Mr. Sullivan: I would like to know more about his qualifications, your Honor.

Mr. Rembar: Certainly.

Q. How long have you been teaching, Mr. Holland?

A. I have been teaching eleven years.

Q. Have you taught English literature during that time?

A. Yes, all that time.

Q. During all of it, and you are now an assistant professor?

A. Associate professor.

Q. Pardon me, associate professor, at the Massachusetts Institute of Technology?

A. Yes.

Mr. Rembar: Is there an objection to the qualifications of the witness?

[fol. 78] Mr. Sullivan: No. He doesn't look like he has been teaching eleven years.

The Witness: I better make this clear—I have been counting two years as a teaching fellow. You asked when did I begin teaching; I have been full-time teaching nine years.

Q. I asked you whether you had an opinion. Now I ask you to state that opinion.

A. It seems to me that the book has literary merit and it has other values. Let me start with other values. I find it extremely interesting from the point of view of a literary historian, essentially as a record of the historical, psychological, social events of the period.

This is a novel of 1748, which was the great decade of the growth of the English novel, and it seems to me that Cleland occupies an interesting place in it, in the transition from what we could call the epistolary form, that's the use of letters to tell a story, toward a more straightforward narrative technique.

I find a lot of descriptions of clothes and prices and customs which are of great interest to me, perhaps because I am a collector of minutiae, I don't know. I note, for example, that the servant is given a silver watch, and this strikes me as an odd and interesting custom that I would like to know more about.

I notice also another 18th century theme, this sense of inherited as against earned wealth, which is an important distinction they made.

Also there is the sense of a ruling passion which I think is a very important part of the theme of the book as a whole. This is the 18th century's version of what we would think of, I suppose, as modern psychology. I think there

is a great deal of insight into the awakening of a woman, into the sexual act, both its normal and its perverted forms.

It seems to me, too, that we learn something quite important here about the sexual tastes of the 18th century. These things, needless to say, are hard to come by, this kind of information. Here I notice in this book a tendency [fol. 79] away from nakedness during the sexual act which I find an interesting sort of sociological observation.

Let me talk for a moment about it simply as a novel. It seems to me, if I were asked to rank it in terms of its literary merit, I would put it some place below the works of Fielding, "Joseph Andrews," "Tom Jones," and some place above Defoe's "Moll Flanders" which makes it, I would say, not a great novel but certainly a rather good one.

In terms of the values of a novel, I think we ask that it come together in a meaningful artistic whole, and it seems to me that this novel does. We would ask that the style and the content work together to create a meaningful experience, and we would ask that the form of the novel and its theme come together to create, again, a meaningful experience.

A number of the other witnesses have commented on the style of the novel which seems to me to be very important. The technical term that an English teacher uses is periphrasis, which is the Greek form of the Latin circumlocution, and I suppose English teachers use it because it makes us sound more learned. But, essentially, all we mean is it is not calling a spade a spade. It is masking over the events described by different kinds of metaphors and figures of speech, as, for example, when she is in her encounter with the sailor, she slips into nautical figures of speech. She refers constantly to the male sexual organ as an engine, this kind of thing, which is pulling you away from the way these events would be described in the 19th or 20th century.

It seems to me that this style of the whole pervades and affects our response and makes an important contribution

to it, specifically, a sense of masking over the events described, and this is why I think the tendency to play down nakedness in the actual events of the novel is quite interesting because the style itself is trying to cover over.

Curiously, Fanny says she is going to give us a naked truth; on the other points, she says she will draw the curtains, and so on. There is a great deal of interest here in what is going to be revealed, made plain, and what is going to be held back.

[fol. 80] Another way in which the form or structure of the novel works together with the theme, it seems to me, is in the sexual acts themselves, that Cleland is using the various sexual acts in the novel to trace the moral progress of his heroine. That is, she starts out with sexual episodes which are not the sexual relations between an adult man and an adult woman, and it is only with her encounter with Charles that she achieves sex with a man, and also with love, as it turns out.

Then she goes farther and farther away from this ideal through the next third, roughly, of the novel. The various episodes that have been mentioned here, the watching of the homosexuals, the masochists, the encounter with the sailor and so on, all of these fall farther and farther away from her ideal relationship with Charles. Then, at the end of the novel, she encounters the rational pleasurist and becomes his heiress, both in money and in wisdom, and shifts over to Charles, discovers Charles again, and comes back to sex with love.

It seems to me that the sexual content of the novel is part and parcel of the theme of the novel. I would agree with the statement that the theme of the novel, in a simpliefid form, is that sex with love is a good thing, morally, psychologically.

This, it seems to me, is all tied up with the style, with the sense of covering things over; that, simply, the raw passion, the ruling passion as Fanny calls it, is not enough, that it has to be with love, with marriage, with, if you like, 18th century poetic diction.

In short, it seems to me this is a novel that comes together beautifully and, well, I was quite pleased to discover it when the publisher brought it out.

Q. Mr. Holland, do you find any observations about people, human behavior, in this book that you deem to be of interest?

A. Yes. I find that there are two that interest me. The first was the awakening of Fanny as a woman to a woman's mature sexuality. It seems to me that Cleland has considerable insight into this process, and that he makes—[fol. 81] well, one is always grateful when a poet or a novelist can bring his insights out in the open in a way that they can contribute to the learning of the rest of us.

And this is true, I think, of his treatment of the masochist. That is, he makes it quite clear in the discussion of the masochist that the pleasure is not in the pain that the man receives, but rather that the pain serves as a prepayment, as it were, of his own guilt, that he can then have the pleasure of the sexual relationship. This, it seems to me, is a very striking insight. It has only been within the last twenty years, I think, that modern psychologists have come around to this view of masochism. It is extraordinary to find it in Cleland in 1748.

Mr. Rembar: That's all.

Cross examination.

By Mr. Sullivan:

Q. Fanny used the words "ruling passion", did she?
A. Yes, she did.
Q. What is that ruling passion?
A. Sexuality, the sexual drive.
Q. Find much of it in this book?
A. Yes, a good deal.
Q. How much of the book is devoted to sexual relations?
A. Mr. Sullivan, are you speaking of numbers of pages or of the book as an artistic whole?

Mr. Rembar: Your Honor, may I repeat the objection and save the exception?

The Court: All right.

Q. Percentific wise.

A. Mr. Sullivan, I don't understand how you can talk about a book in percentages.

Q. Would you answer my question?

A. A book is an artistic whole. You can't divide it into percentiles.

[fol. 82] Mr. Sullivan: May the Court instruct the witness to answer the question?

The Court: How much of the book was devoted to sexual episodes? Is that your question?

Mr. Sullivan: Yes.

Mr. Rembar: I think the answer was that he can't answer it.

Mr. Sullivan: Why doesn't he say he can't answer it?

Mr. Rembar: He said so and explained.

The Court: He didn't say that. He said you had to consider it as a whole.

The question is permissible.

A. May I expand on this?

Q. No. You said that oftentimes Cleland refers to the male sex organ as an engine.

A. I said, I think, Fanny refers to it as an engine.

Q. Fanny does; Cleland through Fanny?

A. Well, there is a difference. I like to keep the difference.

Q. Well, the term "engine" is used for the male sex organ?

A. Yes.

Q. Often in the book?

A. Yes.

Q. And the term "machine"?

A. Yes.

Q. You also say that a theme of the book is to play down nakedness?

A. No, not a theme. Just as these various sexual acts happen, you notice that nakedness does not occur as often as I suspect it would among modern Americans in similar situations.

[fol. 83] Q. Well, in these references to the engine and the machine, is the machine naked at this point?

A. Well, it could hardly not be.

Q. Would you say this was a vivid description?

A. No, it is not vivid at all. It is just the opposite.

Q. Played down?

A. No, it is distance. You are given this peculiar comic perspective. My goodness, the word engine or machine conjures up to me notions of watchworks and the like. This is an odd, an interesting kind of description.

Q. Maybe a paper mill?

A. Well, not—

The Court: In the foreword, Mr. Quennell calls it "bodily equipment".

Q. Isn't the machine and/or engine quite minutely described on a number of occasions in the book?

A. Yes, provided that you recognize it; it is a peculiar kind of 18th century language.

Q. Will you answer Yes or No, Doctor?

A. Mr. Sullivan, all I am trying to say—

Q. Can you give me a Yes or No answer?

A. Not exactly.

Q. I don't care what you are trying to say. I want you to answer my question.

A. It is not described the way a 20th century writer would describe it if you were minutely describing something.

The Court: The question was, in the book, was not this machine or engine quite specifically described?

The Witness: Well, all right, although I still insist that it is in this funny 18th century language, special 18th century language.

Q. The answer is Yes?

A. The answer is Yes, but—

[fol. 84] The Court: You don't need to ask that question again. I read the book. There is a lot of description in the book about these various episodes. I think I understand a description whether given in the 18th century or not.

Q. Are you married, Dr. Holland?

A. Yes, I am, Mr. Sullivan.

Q. Would you use the type of language that is used in this book over the breakfast table with your wife?

A. I would, were I so skilled to speak it.

Q. Would you use this language with a group of eight or ten couples that might come into your home for tea?

A. Yes.

Q. You would?

A. As I say, if I could.

Mr. Sullivan: That's all.

Redirect examination.

By Mr. Rembar:

Q. Mr. Holland, are you familiar with the Horatio Hornblower novels of Mr. Forester?

A. Dimly. I used to read them when I was a kid.

The Court: You say dimly?

The Witness: Dimly.

The Court: It reminds me of the use of the words "dim beacon" in the "Tropic of Cancer" case.

Mr. Rembar: In the minority opinion, your Honor.

Q. Would you say that those novels dealt in large part with the activity of sailing?

A. Yes.

[fol. 85] Q. Would you also say that there is almost no character in that book who is not involved in some way or another in sailing ships?

A. Right; I think that's correct.

Q. As a student of the novel, can you tell me whether it has ever been thought to be a literary requirement that a novel deal with all aspects of life?

A. No, not particularly. A novel necessarily has to limit itself to the scene somewhat and that sort of thing.

Q. Does it deprive a novel of its quality of a work of art if it deals with one aspect of life as, for example, sailing ships?

A. No, not at all.

Mr. Rembar: That's all; thank you.

The Court: Two o'clock.

(Noon recess.)

Afternoon Session

at 2:00 o'clock P.M.

Colloquy Between Court and Counsel re Exhibits

Mr. Rembar: If the Court please, before proceeding with my next witness, I would like to offer in evidence copies of certain newspapers, photocopies, and an original copy of LIFE Magazine.

The Attorney General does not question their authenticity, but takes the position that they are not relevant.

They have to do with the treatment of Profumo-Ward scandals last summer in newspapers and magazines of general circulation. I submit that under the cases cited in my brief, these materials are admissible and relevant.

[fol. 86] The Court: To what cases are you referring?

Mr. Rembar: I am referring to the case of United States vs. Roth; the case of Smith vs. California, and the case in this state of Attorney General vs. Tropic of Cancer. These bear on the issue, I say, of contemporary community standards.

The Court: The ones we had this morning are concerning the opinions of certain persons holding themselves out as critics. Each one of those concerned was some opinion testimony of a witness who is not here, and purely trying to get in opinion evidence in violation of the hearsay rules.

Mr. Rembar: In that connection, I know your Honor has ruled, but I should like to offer those book reviews which came up this morning in evidence, and your Honor has ruled, I think, that they will not be accepted, but I wish to make the formal offer.

The Court: I have acted on those this morning and I have protected your rights. I don't see any need to go over it again.

Mr. Rembar: Yes, sir. Well, now, on this material, however, it goes to a different issue. Those were offered on the matter of literary merit. What I have here is offered for quite a different purpose and it has to do with a different test of obscenity. It has to do with the criterion of whether a particular work transgresses contemporary community standards and what the Court has called customary limits of candor.

I wish to show through this evidence that the public was quite inured to the very type of happening that is portrayed in the novel, was inured to it through seeing it in newspapers and in magazines.

The Court: I will hear you.

Mr. Sullivan: I wish to object, your Honor.

Again, we agreed with my brother that the authenticity of these articles is not contested. However, we are dealing [fol. 87] here with what the public thinks, and I do not feel that that is a proper method of approaching what the contemporary mores or the candor of a given member of the public is.

As your Honor has most correctly pointed out, my objection also relates to the inadmissibility on hearsay grounds. But specifically on the ground of what the public mores may have been while this book is published, I do not believe that these publications are relevant or material to that question.

Mr. Rembar: I wish to point out only one further thing, that, so far as the hearsay rule is concerned, these are not being offered in order to establish the truth of their contents. They are being offered only to show what the

general public was reading at about the time this book was published.

The Court: When was it published?

Mr. Rembar: June, 1963.

The Court: Is that agreed to? You mean this paperback edition?

Mr. Sullivan: I have November of 1963.

Mr. Rembar: It was in the fall, September, October.

The Court: Can you agree that it was either imported, sold, loaned, or distributed in the Commonwealth?

Mr. Rembar: We agree.

Mr. Sullivan: That's an admission in the answer, your Honor.

The Court: Of course, one issue in a case like this is what are the community standards in relation to decency. Let me see the papers.

This particular book was banned in this Commonwealth as early as—

[fol. 88] Mr. Sullivan: 1821, your Honor.

Mr. Rembar: It was an illustration, your Honor, that caused the trouble. I think the report of the case so indicates.

The Court: I think in one of the forewords I read it said that this was the first case in America that a book was suppressed for obscenity.

Mr. Rembar: Yes, sir.

The Court: This involves the same book.

Mr. Sullivan: 17 Mass.

The Court: I will take a recess and look them over.

(Short recess.)

The Court: Gentlemen, in reality, these are reports concerning the morality standards, or lack of morality standards, of England. Of course, we have to go by our particular community in the Comomnwealth of Massachusetts. However, these were printed in LIFE and I probably should take judicial notice that LIFE has a large circulation in Massachusetts.

I think I will admit them. Then you will have to argue, gentlemen, if they are helpful or not in deciding the issue before me. Just a cursory reading of them indicates that these late events are quite different than those detailed in the book.

Mr. Sullivan: Will the Court save my rights?

The Court: Yes.

I will mark the LIFE Magazine Exhibit B.

(June 21, 1963 issue of LIFE Magazine marked Exhibit B.)

[fol. 89] The Court: Boston Record-American, July 1st, 1963, Exhibit C.

(Photocopy of Page 5, Boston Record-American for July 1, 1963, marked Exhibit C.)

The Court: Boston Record-American for July 23, 1963, two pages, Exhibit D.

(Photocopies of Pages 3 and 25, Boston Record-American for July 23, 1963, marked Exhibit D.)

The Court: Boston Record-American, July 25, 1963, two pages, Exhibit E.

(Photocopies of pages 3 and 33, Boston Record-American for July 25, 1963, marked Exhibit E.)

The Court: Boston Record-American for June 29, 1963, two pages, Exhibit F.

(Photocopies of pages 3 and 4, Boston Record-American for June 29, 1963, marked Exhibit F.)

The Court: Boston Globe for July 25, 1963, Exhibit G.

(Photocopy of page 10, Boston Globe, July 25, 1963, marked Exhibit G.)

The Court: Boston Traveler for July 23, 1963, Exhibit H.

(Photocopy of page 13, Boston Traveler, July 23, 1963, marked Exhibit H.)

The Court: Boston Traveler, July 23, 1963, Exhibit I.

(Photocopy of page 12, Boston Traveler, July 23, 1963, marked Exhibit I.)

[fol. 90] The Court: It will be noted that all those photostatic copies of the newspaper articles and the article in LIFE Magazine are admitted over the objection of the Commonwealth, and the Commonwealth has excepted to the admission of each. This action is not being brought by the Commonweath—it is brought by the Attorney General of the Commonwealth.

Mr. Sullivan: The Attorney General's exception.

The Court: All right.

Walter Minton, Sworn

Direct examination:

By Mr. Rembar:

Q. Would you please state your name and place of residence?

A. Walter Minton; I live in Saddle River, New Jersey.

Q. Are you an officer of the corporation which is the intervener here?

A. I am the president of G. P. Putnam's and Sons.

Q. What is G. P. Putnam's and Sons?

A. We are publishers of books.

Q. How long has Putnam's been publishing books?

A. Since 1838.

Q. How long have you been president of Putnam's?

A. I have been president of Putnam's for nine years.

Q. Would you name some of the authors that Putnam's has published over the century and a quarter?

Mr. Rembar: Objection, your Honor.

The Court: I will allow it.

[fol. 91] A. Putnam's has always operated in New York and, as a Middle Atlantic publisher, in our early history, we

have published some of the writers of the New York school, including Washington Irving, James Fennimore Cooper; not from New York, but Edgar Allan Poe; Herman Melville; in more recent years, Sholem Asch; Vladimir Nabokov. We distribute books of Pearl Buck.

Q. Prior to the publication of "Memoirs of a Woman of Pleasure," had Putnam's ever been involved in an obscene case?

The Court: What is the purpose, please?

Mr. Rembar: I want to show the standing and reputation of the firm that published this book, your Honor.

The Court: This action is against the book itself, not against the publisher.

Mr. Rembar: Very well.

Q. After you published this book, did you receive any orders for it from colleges or libraries?

A. A considerable number.

Q. Can you name a few of the colleges?

A. Off the top of my head, I would be hard pressed, other than that I know in the Boston area we had almost immediate orders from the Widener Library at Harvard, from the library at M.I.T., and from a great many other, although, specifically, there is a list. We have compiled these, but I can't remember exactly.

Q. Your answer is sufficient. After the publication of this book, did you receive a communication from the Library of Congress?

A. As I remember, we had two communications: one, that we had not filed a copy of the book in the Library of Congress, which we would ordinarily do for copyright purposes, and they wanted one for the Library; then, of course, later on, there was a request to translate the book into Braille, which the Library of Congress does with a number of books it deems of general interest.

[fol. 92] Q. Was this book distributed through the ordinary channels of distribution that Putnam's employs for its list generally?

A. Yes, sir, through our normal bookstore accounts and through wholesalers who service many smaller bookstores as well as supplying public and college libraries.

Mr. Rembar: That's all.

Mr. Sullivan: I have no questions.

IRA KONIGSBERG, Sworn

Direct examination.

By Mr. Rembar:

Q. Mr. Konigsberg, will you please give us your full name and place of residence?

A. My name is Ira Konigsberg, and I live in Concord, Mass.

Q. What is your occupation, Mr. Konigsberg?

A. I am an Assistant Professor of English and American literature at Brandeis University, Waltham.

Q. How long have you been teaching literature?

A. Nine years.

Q. Do you have any specialties within the field?

A. Yes, 18th century literature, particularly the 18th century novel.

Q. Are you at work on a book concerning the 18th century novel?

A. I am finishing at present a book that deals with the early 18th century novel—that is, the years from 1700 up through 1740's; to be more specific, 1753 is where I stop.

Q. The book in issue here, then, comes at the very end of that period?

A. Yes, that's right.

Q. You have read the book, I assume?

A. Yes.

[fol. 93] Q. Do you have an opinion as to its literary merit or other values?

A. Yes, I do.

Q. Would you please state that opinion?

A. My opinion is that it is an extremely significant literary work, and I base that opinion upon three standards. One is that it is significant as a literary document for a modern day reader; two is that it is significant as a literary document in the history of English literature; and three, that it is an extremely important literary work in terms of the moral values that a literary work can advocate.

I can explain those three a little more specifically if you want.

Q. I wish you would.

A. In terms of its literary value for the contemporary reader, the work is one of those rare things, it is a novel that succeeds. When I say that it is a novel that succeeds, I mean it fulfills all the requirements of serious literature and serious novel writing.

It primarily attempts to create an illusion of reality for the reader through the creation of realistic characters, realistically portrayed in a semi-credible or realistic situation.

Secondly, it is an organized, shaped, patterned work of art. It has all the elements in it—the various episodes, the chapters, are all unified together for one specific end, and that is the writing of a complete work of art itself.

On these standards, I think it succeeds, and it succeeds extremely well.

In terms of its historical importance, I think it is extremely significant that this particular novel was published in 1749; that is the year that Fielding's "Tom Jones" was published. With Fielding's work "Tom Jones," Cleland's "Memoirs of a Woman of Pleasure" is a very specific reaction to a kind of literature that was published at the time, that is, the novels, in particular, of Samuel Richardson. [fol. 94] Cleland is part of what I should call this cultural battle that is going on in the 18th century, a battle between a restricted Puritan, moralistic ethic that attempts to suppress freedom of the spirit, freedom of the flesh, and this element is competing with a freer attitude towards life, a

more generous attitude towards life, a more wholesome attitude towards life, and this very attitude that is manifested in Fielding's great novel "Tom Jones" is also evident in Cleland's novel.

This work is of extreme importance in this aspect. In fact, Cleland himself echoes parts of Richardson's works.

As you know, Richardson wrote two novels. His first novel, "Pamela," is the first English novel, first modern English novel, and this was published in 1740. The second work Richardson wrote was "Clarissa" which was published 1747 to 1748. Cleland's work, with "Tom Jones," comes in 1749.

Q. Excuse me—you say Cleland's work with; you mean Cleland's work and "Tom Jones"?

A. Both published in 1749. I will make this brief.

"Pamela" is the story of a young country girl; "Clarissa" is the story of a woman trapped in a house of prostitution. Obviously, then, Cleland takes both these themes, the country girl, her initiation into life and into experience, and the story of a woman in a house of prostitution, and what he simply does is to take the situation and reverse the moral standards.

Richardson believed that chastity was the most important thing in the world; Cleland and Fielding obviously did not and thought there were more important significant moral values.

So, just to sum up this point, the work is of historical importance, one, because it tells us about a cultural conflict in the 18th century; two, because it tells us something about the literary plots and character types that were being used. [fol. 95] To add a footnote to that, there is a long tradition of the young girl coming from the country and being brought to a brothel and being experienced into life. These works are readily available in libraries, and Cleland's work is part of this tradition. It begins in 1677 with the play by John Leonard, "Country Innocents;" it goes right up until Lillo's play, in 1738, "Marina." All of these deal with simi-

lar situations. Cleland then is taking a very typical literary plot and very typical literary characters that are prevalent in the literature of this period and he is using them in the situation that the common reader of the period would be used to, only he is infusing his own particular moral ethic.

And thirdly it is important historically because it tells us something about the development of the English novel as a literary form.

This cannot be emphasized enough. Before 1740, there is simply no modern English novel. The works of Daniel Defoe that are published throughout the first few decades come closest, but they lack what Cleland's novel possesses, and for this reason Cleland is one of the first three English novelists, or the first three writers of English fiction to write what we today call a modern novel.

Q. Mr. Konigsberg, when you say Defoe's works lack what Cleland's work possesses, what do you have in mind?

A. Well, very simply, DeFoe's works are the culmination of a tradition in English fiction, a culmination of a tradition which I think we best call the fictitious history. He is working along these lines; he brings a few further elements to it.

What Richardson introduces to the novel is an extensive amount of psychological realism, a specific creation of emotional qualities. In other words, he is emphasizing the humanistic qualities of his characters, the realistic qualities of them as real people.

Q. You find this in Cleland's work as well as Richardson's?

A. Cleland's work as well as Richardson and Fielding.

So, in the presentation, then, of realistic characters and realistic situations with emphasis upon emotional reac- [fol. 96] tion and emphasis upon psychology, Cleland is right there at the beginning, and his work is extremely significant in this way.

Secondly, stylistically—I should say fourthly at this point—the work is important in telling us something about the literary history of the novel. The prose style which has

been referred to by the previous witnesses has been called typical of the 18th century and highly artificial. What has not been specifically stated is the way in which Cleland uses this prose style and which makes him such a remarkable, I think, literary figure, at least literary stylist of the novel. That is, within the framework of the traditional 18th century prose style which is sort of a free, loose, yet at the same time balanced kind of sentence, he is on the one hand creating for us remarkably realistic sense, particular sense in a novel extremely realistically portrayed, and on the other hand creates for us a kind of impressionistic writing.

That is, many of the scenes, I go so far as to say most of the scenes, are portrayed to us as Fanny sees them, and what is generally called common metaphor becomes in her hands, or rather in her language, a means of expressing exactly how she feels to the experience. This also is simply not done in this period.

So, in all of these bases, I claim that this is an important novel. Cleland is not one of the six major novelists of the period, but he is significantly better than the rest of the minor figures. He somehow falls short of Richardson, Fielding, and Defoe, but if you have read novels of the minors, Mrs. Haywood, Sterne, he is supremely superior to them.

The third and last point I want to make is that I think it is an important literary book because, if you consider that serious literature must itself make some kind of serious statement about life and experience, I think this book does, and I think it is extremely important to us as a literary document in this period.

In our own culture, which is advocating, through films and through TV plays, an unhealthy attitude towards the human body—

[fol. 97] The Court: Just a moment. He is arguing now.

Q. Mr. Konigsberg, let me go back for a moment. In describing the early development of the novel, you said that there were two rather antithetical ideas, a sort of a

contest between these early novelists. I want to make sure I understand who is on which side.

A. I wouldn't call it a contest. May I just specifically give you the context of this sort of cultural battle concerning life? We can begin with the Commonwealth. The Commonwealth is the period of extreme suppression of, you know, freedom of life.

Q. You are referring to the Commonwealth in 17th century England?

A. 17th century. It is followed, of course, by the Restoration, which is a reaction to that, which is an excessive kind of libertine life and excessive sexual freedom. This is followed by a very significant middle class reaction, the beginning of the 18th century of which Richardson, you know, is part. That is, it has its Puritanical emphasis upon chastity as a reaction to the kind of Restoration, or cavalier, attitude towards life. In reaction to the kind of thing Richardson is doing, you have Fielding and Cleland who are trying to advocate again a more wholesome view of life itself and the relationship between the sexes.

If I could just make this last point, in relation to that, in relation to the point I was going to make, and that is that the book—

The Court: Just a moment. Keep the witness under control, please.

Mr. Rembar: The witness has said he would like to make one last point in relation to that.

The Court: I know it. You are the gentleman who has to argue the case.

Mr. Rembar: I think, your Honor, that he is helping me with my argument by putting this book in its proper historical context.

[fol. 98] The Court: Let's abide by the rules of evidence, the rules of law in the presentation of cases in court.

Mr. Rembar: I submit, your Honor, that under the law, as presently established, the place of any work in its historical context is of the utmost importance.

The Court: You just proceed and ask questions of the witness.

Q. Mr. Konigsberg, you referred to the attitude toward sex which you find manifested in John Cleland's book. It may be helpful to us if you would compare that with the attitude towards sex manifested in the contemporary novel, or in a good many contemporary novels.

Mr. Sullivan: I object, your Honor.

The Court: That's just a statement, that it might be helpful if you compare it?

Mr. Rembar: I would like him to compare it. I would like his opinion. He has been qualified as an expert on it, in this field. I would like his opinion of the literary treatment of the subject matter of this book as compared with the literary treatment of the subject matter of various contemporary novels.

The Court: Well, your various contemporary novels—

Mr. Rembar: I mean contemporary novels that deal with the subject of sex, which this book does.

Mr. Sullivan: We don't have any of those before the Court, your Honor.

Mr. Rembar: They are part of our culture, your Honor, and if any book is to be evaluated, it must be evaluated in relation to other things that constitute part of that same culture.

[fol. 99] The Court: Yes, but you are asking about other contemporary novels. I have to have some idea what books you are referring to.

Mr. Rembar: All right. I will refer to "Giovanni's Room" by James Baldwin, to "Run, Rabbit, Run" by John Updike, to "The Group" by Mary McCarthy, to "The Naked and the Dead" by Norman Mailer, to "From Here to Eternity" by James Jones.

The Court: What is your question?

Mr. Rembar: My question is this: how in the opinion of this witness does the treatment of sex in these modern novels compare with the treatment of sex in the novel before the Court?

Mr. Sullivan: I object, your Honor.
The Court: I will allow it.

A. Yes. The treatment in Cleland's novel is obviously more healthy, and this can be simply substantiated by a comparison of his text.

The Court: More healthy?
The Witness: Yes, sir, more healthy. This is towards sex, the question is.

A. (Continuing) This can be substantiated by a comparison of this text with the texts you mentioned. "Giovanni's Room," which is a well-known novel, is about homosexuality. The other novels deal with various kinds of love in modern 20th-day society, and it is generally treated ruthlessly. That is, the relationship between the sexes is seen as another manifestation of modern decadence, insterility or perversion.

Cleland's point simply is this, that, with love, the relationship between men and women can be a wholesome, healthy, experience itself.

I would just like to read two very brief sections from the novel to substantiate my point, right here from the novel itself.

[fol. 100] Q. If they are brief enough.

A. Extremely brief. One is in the hard cover edition, Page 293, and remember this is a novel that deals with the development of a heroine, and this is the culmination of her experience—

The Court: What about the three other girls whose history is given in the book besides Fanny? Remember about three other associates of hers in whatever you might call her calling?

The Witness: Yes. Well, actually, they are dealt with similarly in a complex manner. If I recall, the three of them end up well. One ends up married and the other two do end up happy, but various aspects of their professional life are attacked by Fanny at various times in the novel

as being perverse or in bad taste or without love, and, when they do undergo these experiences—for example when one of the girls dresses as a man and ends up with another man, Fanny is quite willing to expose this as in poor taste. Yet, when the actual relationship with men is one composed partly of love, then she is willing not to condemn it but to appreciate it, and the same standard is held with these other women.

The Court: Would you say these three other girls told about their experiences with a sense of pride?

The Witness: No.

The Court: Sense of exaltation?

The Witness: I wouldn't use those particular words. I think they are too strong for that. I know the section you refer to. I think those words are too strong.

The Court: Well, go ahead.

A. (Continuing) The reference I make is on Page 293 of the hard cover edition, when she says:

> [fol. 101] "Love that may be styled the Attic salt of enjoyment; indeed without it the joy, great as it is, is still a vulgar one, whether in a king or a beggar, for it is undoubtedly love alone that refines, enobles and exalts it."

This to me certainly is not an unhealthy attitude.

Q. Not an unhealthy attitude?

A. Is not an unhealthy attitude. What Cleland is trying to do is to advocate a healthy relationship between men and women, one based upon respect for physical wellbeing, and, in reference to the books you have mentioned as well as our general culture, we have an emphasis today upon violation of physical being, upon grotesqueness, upon various kinds of physical injury and harm. This is very prevalent in the modern novel as well as in other art forms.

What Cleland is saying is just the opposite, that the human body is something that is wholesome, that is healthy, that is normal, and that is beautiful, and when people come

together in love, then in the experience itself is something that is wholesome.

The Court: What about the whipping incident?

The Witness: That, too, is held up.

The Court: The homosexual incident?

The Witness: Yes, sir.

The Court: The Lesbianism.

The Witness: They fit into the pattern. The homosexual incident is held up with scorn. It is undercut throughout by a very strong comic element. The same can be said of the whipping. She reacts violently to both of them.

If we consider the work as a whole, these acts of sexual perversion are there to be juxtaposed to the acts which are partaken in sexual health. Otherwise, the point couldn't be made.

[fol. 102] The Court: Would you describe the description given by the author of these acts as pornographic?

The Witness: Could you tell me what you mean by pornographic?

The Court: You don't know what I mean?

The Witness: I don't know what you mean. I know what I would mean by pornographic.

The Court: If you don't know, you need not answer.

Mr. Rembar: I don't have any further questions of this witness.

Cross examination.

By Mr. Sullivan:

Q. Did I understand you to say that the third category of why this book was extremely valuable was because it had moral value?

A. Yes.

Q. And I think you further said that other books in this period that you yourself are writing on at this time—

A. That's right.

Q. Is this a novel you are doing?

A. It is a book on the novel, scholarly book on the novel.

Q. —are available from this period?

A. Yes.

Q. Do they deal with sex in the same way that "Fanny Hill" deals with sex?

A. I can answer that with a qualification. The qualification is no two books can handle sex the same, but they do have a similar emphasis upon sexual matters, yes.

Q. So you could writ your scholarly work without the benefit of "Fanny Hill"?

A. Yes, I could, although it would be—

[fol. 103] Mr. Sullivan: I have no further questions.

The Court: All right; that's all.

Mr. Rembar: Your Honor, that concludes the intervener's case.

The Court: Is the evidence all in?

Mr. Sullivan: Yes, your Honor.

The Court: Do you want to argue this afternoon or tomorrow morning?

Mr. Rembar: This afternoon, if your Honor pleases.

The Court: All right. We will take a short recess.

(Recess.)

ARGUMENT BY MR. REMBAR

Mr. Rembar: If the Court please, the testimony given here today must be weighed in the light of what the United States Supreme Court has said about the matter of obscenity.

As the Court knows, the intervener has waived every defense except the defense that this book is protected under the guarantee set forth in the First Amendment. It is not really very long since the time when the Supreme Court declared that if a book is challenged under an anti-obscenity statute, the question is a First Amendment question.

That was indicated first in 1956 in the case of Butler vs. Michigan, where the Supreme Court said that a book might not be suppressed on the ground that it might be harmful to children.

The next year, in the twin cases of United States vs. Roth and Alberts vs. California, the Supreme Court considered the problem generally, and it is important to note just how generally the Supreme Court viewed those cases. They [fol. 104] came to that Court on certified questions, and the questions were simply these:

Are the statutes under which the defendants were convicted in those cases, on their face, in toto, unconstitutional? Counsel for Roth and Alberts both took the position that there can be no anti-obscenity legislation, that such legislation flies in the face of the absolute prohibitions contained in the First Amendment.

The Court considered only that question. It did not consider whether the materials involved were in fact obscene or in law obscene. It considered only that single question, can anti-obscenity legislation under any circumstances have a constitutional application?

The answer of a majority of the Court was Yes. Four judges dissented. The five-judge majority, however, said Yes with a very important qualification, and that was that such statutes have only the narrowest application.

The Court set up several tests for what might be deemed obscene, but its primary view of the matter resulted in what has come to be known as the social value test, a test which a majority of the Supreme Judicial Court of this state has declared to be the law.

That test is this: does a work which is challenged have any redeeming social value? That value, as the Court pointed out, might take many forms. It might be scientific, it might be political, it might be artistic, it might be literary, but if it has any such value, the Court, held, then in the constitutional sense the book is not obscene. The phrase used by the Court was that a book might be held to be obscene if it is utterly without redeeming social value.

The Court went on and set up an additional test for obscenity, and that is the criterion of whether the book, taken as a whole in the light of contemporary community standards and viewed in its impact on the average man,

predominantly appeals to prurient interest. This, we submit, is an additional test. That is, if the opinion of the [fol. 105] Supreme Court is properly read and the answer to the social value question is in the affirmative, that is the end of the case. If it is in the negative, then, before a book may be found obscene, it must still fail by this prurient interest test.

A few years later, the Court added still a third test. This was in the case of the magazine called "Manual Enterprises," which was a magazine obviously designed, as the Court pointed out, to appeal to a homosexual audience and to create a response on the part of homosexuals. Nevertheless, even though this book would flunk the social value test, it passes another test, and that test the Court called patent offensiveness. They said that a book must, on the face of it, be offensive, regardless of what may lie underneath.

All three of these tests were noted and followed by a majority of the Supreme Judicial Court in the case involving "Tropic of Cancer".

Reviewing these tests in reverse order, so far as patent offensiveness is concerned, this book, despite its subject matter, is on its surface not offensive. It is not coarse or gross or vulgar. On the contrary, it is on the surface of it, at least, elegant.

So far as prurient interest is concerned, what Supreme Court meant by that can really only be found by considering the Supreme Court's actions in subsequent cases, and, in subsequent cases, the Supreme Court unanimously and per curiam reversed holdings against publications on the part of lower courts.

I respectfully refer this Court to the description of the materials involved in those cases that are found in our brief. I submit that a comparison of what was involved in those cases with what is involved in this case shows that the book at issue is clearly safe under the prurient interest test.

Now, as I pointed out to your Honor, our position with respect to evidence is that testimony is inappropriate on the question whether the dominant appeal of a book is to prurient interest or whether it is obscene; these, we submit, [fol. 106] are legal conclusions. Testimony is appropriate, however, in order to show the facts that shed light on contemporary community standards, and it was with that in view that we submitted the newspapers and the magazine that are before the Court. It was with that in view that we asked witnesses about other books which are currently published.

There I wish to emphasize, your Honor, that we did not bring in the cheap junk that you see on newsstands, that I saw only this morning on Washington Street, where the Attorney General might properly answer, "The only reason that material is not in court is that we don't have time."

I am not saying that that sort of comparison should be made, but I am saying that a comparison may well be made with current works of fiction that are published by reputable publishers, sold in respectable bookstores, and generally accepted as works of literature in the literary world.

When that comparison is made, as our witnesses have testified, the treatment of the subject matter in this case is seen to be much less extreme, much less brutal, much less explicit than what the public is currently reading.

Finally, our evidence dealt with the matter of social value, and here it was opinion evidence. Social value as shown by the presence of literary merit or historical significance is that redeeming social importance that the Supreme Court has said the First Amendment protects. Whether or not a book has literary merit is a fit subject for expert opinion testimony. Just as in a personal injury case the Court hears physicians give their opinion as to the nature and extent of injuries, so in a case dealing with literature the Court may hear qualified experts give their opinion as to whether the book has merit.

On cross-examination of the intervener's witnesses, something was made of the fact that this book deals in great

measure with sexual activities. We submit that under the decisions of the United States Supreme Court and the Su-
[fol. 107] preme Judicial Court, there is no subject matter as such which is forbidden to the artist. The only question is, "How does he deal with it?" Does he deal with it in such a way that his product can be said to be a work of art or a work of literature? If so, that is the end of the matter. There is nothing which is foreclosed to the inquiring mind or to the pen of the writer, nothing in terms of subject matter.

Finally, I would say a word about the testimony of the witness for the Attorney General. I would submit that, in spite of his statement that he read the book last night, he displayed a rather appalling lack of familiarity with its contents.

In addition, while he testified that the book before the Court is obscene, prurient, offensive, and indecent, his understanding of those words is demonstrated by the fact that he would apply each one of them to a book which the Supreme Judicial Court has held to be not obscene. That book, of course,—

The Court: By a four to three vote.

Mr. Rembar: Still binding on this Court, your Honor. And I would call to your Honor's attention that it is only by a five to four vote that any anti-obscene legislation still stands on our statute books.

Thank you.

ARGUMENT BY MR. SULLIVAN

Mr. Sullivan: I would first like to point out to your Honor that this action is brought by the Attorney General in a request to the Commission against Obscene Literature, duly constituted body of the Legislature of this Commonwealth, under the provisions of Chapter 272 of the General Laws.

The intervening defendant has waived his statutory rights, and I would specifically note Section 28 of the said

Chapter 272 which relates to the distribution to a person under the age of 18 years.

[fol. 108] Under the Roth case coming up from California and the Alberts case, I believe, coming up from Pennsylvania, there was established and reserved to the states the power to enact anti-obscenity legislation and to constitutionally prohibit obscene literature through state enactment.

Our statute uses the words "obscene," "impure," and "indecent". I do not feel that any witness could in good conscience say that this book did not fall into the categories of those three words.

Again relating to the statute, we are dealing here with an equity proceeding. The matters before the Court are to aid you in your judgment of this book.

I would like to point out that the intervener's witnesses, albeit, I am sure, all intelligent men, and I respect them all for their ability and their minds, come from one walk of life. We had no witnesses from the housewives, the husbands, the many and varied facets of our community to whom this book is available. We are therefore dealing with literary men whose testimony is weighted towards the fact that this book has some social value, that it has some literary merit. Of course they are going to say it; this is their field of employment and work.

Further, on the question of these witnesses and the test of social value, the question of being utterly without social value or unredeeming is a question that is not clearly stated by the Court. They do not take into account a balance. It is not clear whether they say that if the book is obscene then we may look to the question of social value.

The patently offensive test coming out of California relates to a criminal code in California which is all that the Supreme Court had before it and which criminal code is dissimilar to the statutes in this Commonwealth.

I necessarily read this book prior to trying this case. I am not a literary expert, although I did major in English in college. I am not one easily offended, but I was offended

by this book, and I feel there is no literary merit in it. It [fol. 109] did arouse prurient interest and impure thoughts in me. Fortunately I am well adjusted enough so it did not affect my daily life, but I wonder if that could be said for everyone who has access to a book of this nature.

Thank you, your Honor.

The Court: This is the type of case where, as counsel pointed out, there is a great difference of opinion as to facts and the weight to be given. The United States Supreme Court divided on a five to four decision; the Supreme Judicial Court divided by four to three. Each case is different; it depends on different facts. Of course, I have to give this quite a lot of study before I make my findings.

I was interested in the foreword of the book where Mr. Quennell quotes James Boswell in 1772 as calling this book the "most licentious and inflaming book." I guess they have differed about this book since 1749.

You have presented a real problem to me, gentlemen, and I will have to take my time.

(Hearing adjourned at 3.15 o'clock P.M.)

Stenographer's Certificate to foregoing transcript (omitted in printing).

[fol. 110]

FINDINGS OF FACT, RULINGS OF LAW AND ORDER FOR FINAL DECREE—entered September 3, 1964

1. Thirty years after the adoption of the First Amendment and forty-seven years before the adoption of the Fourteenth Amendment to the United States Constitution, the book entitled "Memoirs of a Woman of Pleasure", written by John Cleland in 1749 was adjudicated obscene by the Massachusetts Supreme Judicial Court in the case of *Commonwealth* v. *Holmes,* 17 Mass. 336, decided in 1821. The *Holmes* case is said to be the first recorded book suppression case on the grounds of obscenity in American history, although, as early as 1712, Massachusetts made it a crime to publish any filthy or obscene "pamphlet."

2. Now, the Attorney General of the Commonwealth has brought the petition in this case under the modern statutes found in General Laws, c. 272, §§ 28C to 28H, inclusive, as amended by St. 1945, c. 278, praying that it be judicially determined that the book is obscene, indecent and impure. The present publisher of the book, G. P. Putnam's Sons of New York, has intervened as a party respondent as permitted by those statutes. It prays that the Court first determine that the book is not obscene, indecent and impure, and, secondly, to enter a declaratory judgment to the effect that (a) a sale or distribution of the book is protected by the First Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment and that (b) any application by the Attorney General of General Laws, c. 272, §§ 28C to 28H, if it results in an adjudication that the book is obscene, indecent or impure, or any acts to suppress its sale or distribution, would be unconstitutional under the two federal constitutional amendments cited.

3. The freedom of expression guaranties of the First Amendment to the United States Constitution are similar in kind to Article XVI of the Massachusetts Constitution, adopted far ahead of the First Amendment. Article XVI originally provided that "(T)he liberty of the press is essential to the security of freedom in a state: it ought not, therefor be restrained in this Commonwealth," and in 1946-1947 an addition was made to it which reads: "(T)he right of free speech shall not be abridged." As the United States [fol. 111] Supreme Court did many years later in the case of *Roth* v. *United States,* 354 Mass. 476 (1957), the Massachusetts Supreme Judicial Court held as early as 1838, in an opinion written by Chief Justice Shaw in *Commonwealth* vs. *Kneeland,* 20 Pick. 206, 219 (37 Mass. 206), that the right of free press did not give an unrestricted license to anyone to print anything and that it was not a denial of such freedom for the legislature to enact laws, like our statute on blasphemy, for the common good and for the

protection, safety, prosperity and happiness of the people. While reference has been made in the briefs as to the state's constitutional powers, the intervener in its brief has waived any rights of protection under the Massachusetts Constitution and has taken no position as to the proper construction of the pertinent Massachusetts laws apart from the limitations on such construction as are imposed by the First Amendment to the United States Constitution. This leaves as the main issue: Is this book, "Memoirs of a Woman of Pleasure" protected by the guaranties of said First Amendment?

4. Upon the filing of the petition and in accordance with General Laws, c. 272, § 28C, on February 10, 1964, a justice of this Court examined the book by reading and studying its entire contents and was of the opinion that there was reasonable cause to believe that the book was obscene, indecent and impure. Thereupon, he ordered the issuance of an order of notice to be made by publication and registered mail, against the book and addressed to all persons interested in its publication, sale, loan or distribution, to show cause why the book should not be judicially determined to be obscene, indecent and impure. After the issuance of the order of notice, he entered an interlocutory decree finding and adjudicating that the book was obscene, indecent and impure under the provision of said General Laws, c. 272, § 28C. Appearances and an answer were filed by the intervener, G. P. Putnam's Sons, the publisher and the holder of the copyright of the book and interested in its sale, loan or distribution. It was agreed in the answer that the book was on or about the date of the filing of the petition "imported, sold and distributed in the Commonwealth." The edition sold was a paperback edition, selling at ninety-five cents a copy.

5. The hearing on the merits under the provisions of General Laws, c. 272, §§ 28C to 28G, as amended by St. [fol. 112] 1945, c. 278 took place on May 27, 1964. Upon its

conclusion, counsel were given until June 19, 1964 to file additional briefs (trial briefs had been filed). However, on June 22, 1964, the United States Supreme Court filed decisions in four new obscenity cases, each with majority and minority opinions: and, on July 10, 1964, the Court of Appeals of the State of New York decided by a five to four vote that "Memoirs of a Woman of Pleasure" was not obscene. During the month of July other obscenity suppression cases were decided by the highest courts of Illinois and Florida. New briefs and memorandum continued to be given to the Court by counsel as such cases were decided and reported.

6. At the trial, the book was introduced in evidence. Persons who qualified as literary experts testified and photostatic copies of American magazine and newspaper reports of sexual life and episodes in this country and in England were admitted in evidence. During the course of the hearing, the expert witness for the Commonwealth, who was of the opinion that "Memoirs" had no or little literary merit, was asked by the intervener's counsel if he agreed with the opinion of the book as stated in the New York Sunday Times Book Review written by J. Donald Collins in the edition of July 28, 1963, and counsel for the intervener offered a copy of the article as an exhibit. Upon objection by the Attorney General, I excluded the article as evidence on the ground that it was a hearsay opinion of a purported literary expert, not in court and, of course, not under oath or subject to cross-examination. Exception being taken, counsel for the intervener made an offer of proof submitting as his offer a copy of the article which was subsequently marked Exhibit 1 for Identification and is printed in the transcript in full. The same course was followed for the same reasons relating to three other documents: (a) the article entitled "The Harlot's Progress" by V. S. Pritchett in the October 31, 1963 edition of the New York Review of Books, which, in an offer of proof, became Exhibit 2 for Identification; (b) the article en-

titled "Mersey Sound, 1750" by Brigid Brophy in the November 15, 1963 issue of the New Statesman, p. 710, marked Exhibit 3 for Identification; and (c) an article entitled "Task" in the Modern Living section of the August 2, 1963, edition of TIME Magazine, which became Exhibit 4 for Identification. All these articles are typed in full in the [fol. 113] transcript. I am reversing the rulings made concerning the admission of these articles and admit them as full exhibits in the consideration of the decision to be made in this case. I do so because (1) of the decision in *Jacobellis* v. *Ohio,* —— U.S. —— decided June 22, 1964, 42 L.W. 4652, holding that "contemporary community standards of decency" do not relate to state and local "communities" as such, but rather in the sense of "society at large . . . the public or people in general . . . based on a national standard" for, after all, the Supreme Court said, it is "a national Constitution that we are expounding": and (2) for the reason that to comply with this new interpretation of what the community standards of a nation are, all matter, such as judicial decisions and records of all federal and state courts, and knowledge acquired from books, magazines, news sources and other informational media relating to standards of decency throughout the United States must be considered for the determination of "contemporary community standards."

7. Justices of the United States Supreme Court (*Jacobellis* v. *Ohio,* decided June 22, 1964, 32 L.W. 4653) and justices of the highest state Courts—(Court of Appeals, State of New York, *Larkin* v. *G. P. Putnam's Sons,* decided July 10, 1964, Supreme Court of Illinois, *Haiman* v. *Morris,* —— Ill. ——, eventually decided in July 1964, and Supreme Judicial Court of Massachusetts, *Attorney General* v. *"Tropic of Cancer",* 345 Mass. 11) have concluded that in the area of law relating to obscenity suppression cases, great difficulties are encountered because each judge "cannot avoid making an independent constitutional judgment of the most sensitive and delicate kind" in determining the

facts of the particular case heard before him to ultimately decide whether the material sought to be suppressed is constitutionally protected. Despite the strong opposition of the Chief Justice and another member of the United States Supreme Court, the majority of the Court on June 22, 1964 in the *Jacobellis* case (32 L.W. 4652—1964) held that in every case of the kind now before the Court must be ultimately decided—individually, case by case, and as a matter of duty—by the United States Supreme Court, no matter how "difficult, recurring and unpleasant" the task may be to the United States Supreme Court. But it is evident that heavy responsibilities still remain upon the lower federal and state trial and appellate courts in deciding cases be- [fol. 114] fore they reach the United States Supreme Court for, in the interval, there is a duty upon the lower courts to protect, on the one hand, "society's right to protect its moral fiber" and the effective administration of justice by preventing the circulation of such pornography as the United States Supreme Court in the *Roth* and in the *Jacobellis* cases hold are not within the protection of the First Amendment; and, on the other hand, to protect publications and other materials entitled to the rights of freedom guaranteed by the First Amendment if public authorities seek to suppress them. And in carrying out these heavy responsibilities, personal predilections of a judge, his prejudices, and his preferences, including any "distaste for commercial exploitation" (*People* v. *Richmond County News, Inc.*, 9 N.Y. 2nd, 580, 588) must be particularly subverted and decisions made with cold indifference in cases of this kind.

8. We, of the Superior Court, are bound by the principles of law in the determination of this kind of a case as those principles are set forth in the majority decision in *Attorney General* v. *"Tropic of Cancer"*, 345 Mass. 11. In that case is an exhaustive survey of the United States Supreme Court and Massachusetts cases relating to obscenity suppression problems. In addition we are bound by the principles of law set forth in the more recent cases

of the United States Supreme Court that were decided both in and after the decision in the leading case of *Roth* v. *United States,* 354 U.S. 476, 488-489. The subsequent cases are: *Manuel Enterprises Inc.* v. *Day,* 370 U.S. 478; *Sunshine Book Company* v. *Summerfield,* 355 U.S. 352; *Kingsley Int'l. Pictures Corp.* v. *Regents,* 360 U.S. 684; *Jacobellis* v. *Ohio,* —— U.S. ——, 32 L.W. 4652, decided on June 22, 1964; *A. Quantity of Copies of Books* v. *State of Kansas,* —— U.S. ——, decided on June 22, 1964; *Grove Press* v. *Gerstein,* —— U.S. ——, decided on June 22, 1964, and other per curiam decisions. They have expanded somewhat, but not substantially, the law as it existed when the *"Tropic of Cancer"* case was decided by the Supreme Judicial Court in 1962.

9. The clearly established rule that obscenity, if utterly without social importance, is not entitled to the protection of the First Amendment guaranties was stated by Mr. Justice Brennan in *Roth* v. *United States,* 354 U.S. 476, 484 as follows:

> [fol. 115] "All ideas having the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. *But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . .*" (Emphasis supplied.)

10. The question is whether "Memoirs of a Woman of Pleasure" can reasonably and constitutionally be found to be obscene. In *Roth,* the test of obscenity in *Regina* v. *Hicklin,* L. R., 3 Q.B. 360 (1868) was rejected and the rule was enunciated that the test of obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interests." Material "appeal-

ing to the prurient interest" was defined as "material having a tendency to excite lustful thoughts" (354 U.S. 476, 487, ftn. 20). But sex and obscenity are not to be treated as synonymous, p. 487. In making this definition, the Supreme Court adopted as a supplemental definition a definition found in the 1957 tentative draft of the A. L. I. Model Penal Code. In the 1964 *Jacobellis* case, 32 L. W. 4652—1964, the Court explicitly reaffirmed in the more recent 1962 Proposed Official Draft of the Penal Code, amending the former one, so that the Code definition, as so reaffirmed, presently reads as follows:

> "Material is obscene if, considered as a whole, its predominant appeal is to the prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion and if, *in addition,* it goes *substantially* beyond customary limits of candor in describing or representing such matters." (Emphasis supplied.)

11. These definitions of obscenity applicable to the standard required to determine what is and what is not constitutionally protected material have been the subject of much discussion and controversy. The enunciated standard resting upon the definitions was held by the Chief Justice and two other justices of the Massachusetts Supreme [fol. 116] Judicial Court in the dissenting opinion of *Attorney General* v. *"Tropic of Cancer",* 345 Mass. 11 at 22 as "too dim a beacon by which to guess a course." This comment must have come to the attention of the Supreme Court for the case is cited in a footnote in the *Jacobellis* case. In *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 66, it was said that what separates obscenity from constitutionally protected expression requires ascertainment by a "dim and uncertain line." In *Jacobellis,* the United States Supreme Court recognized that its definition of obscenity in the *Roth* case "is not perfect (but) we think that any substitute would raise equally difficult problems and we therefore adhere to that standard." Chief Justice Warren in the

minority opinion in the *Jacobellis* case wrote in this connection:

> "For all the sound and fury that the *Roth* test has generated, it has not been proven unsound, and I believe that we should try to live with it—at least until a more satisfactory definition is evolved."

12. In *Attorney General* v. *"Tropic of Cancer"*, 345 Mass. 11 at 19, the majority concluded that "with respect to the material designed for general circulation, only predominantly 'hard core' pornography, without redeeming social significance, is obscene in the constitutional sense." This conclusion has been reached by a number of other courts. Some of these opinions are referred to in the concurring opinion of Mr. Justice Stewart in the *Jacobellis* case (32 L.W. 4652) a case wherein Mr. Justice Stewart said: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (of pornography): and, perhaps, I could never succeed in intelligently doing so. . . . But I know it when I see it and the motion picture involved in this case is not that." Chief Justice Warren in the dissenting opinion in the *Jacobellis* case wrote: "We are told that only 'hard core pornography' should be denied the protection of the First Amendment. But who can define 'hard core pornography' with any greater clarity than 'obscenity'? And even if we were to retreat to that position, we would soon be faced with the need to define that term just as we are now faced with the need to define 'obscenity'. Meanwhile, those who profit from commercial exploitation of obscenity would continue to ply their trade unmolested."

[fol. 117] 13. With the interdiction of the Massachusetts Supreme Judicial Court in the "Tropic of Cancer" case (345 Mass. 11, 19) that only predominantly "hard core" pornography, without redeeming social significance, is obscene in the constitutional sense and the misgivings relating to the clarity of definition of that kind of obscenity ex-

pressed by Chief Justice Warren and Mr. Justice Stewart, the trial court is faced with the task of explaining what 'hard core' pornography is. This Court cannot make a definition of it in a single sentence. A composition of statements defining "hard core" pornography, gained from decisions (such as *People* v. *Richmond County News, Inc.*, 9 N.Y. 2nd 586) and writers on the subject, demonstrates that it is that kind of obscenity that "focuses predominantly upon what is sexually morbid, grossly perverse and bizarre without any artistic or scientific purpose or justification." It is recognizable "by the insult it offers, invariably to sex and the human spirit" (D. H. Laurence, *Pornography and Obscenity* (1930), p. 2) and it is to be differentiated from the bawdy and the ribald. It depicts "dirt for dirt's sake." "It depicts that type of obscenity that is vile, rather than course, and is a blow to the senses rather than to the sensibilities." It smacks of licentious fantasy and unreality, of orgiastic exhibitions of sexual episodes, of sexual perversion and sickness and represents a "debauchery of the sexual faculty." "It involves a kind of 'pandering' or 'commerce in the obscene", *Attorney General* v. *"Tropic of Cancer"*, 345 Mass. 11, 19. A pornographic book "is one deliberately designed to stimulate sex feelings and to act as an aphrodisiac." (St. John-Stevas, *Obscenity And The Law*, p. 2) and is commonly a series of increasingly erotic and libidinous scenes without distracting non-erotic passages.

14. In the *Roth* definition of obscenity, 354 U.S. at 489, the test is whether to an average person, *applying contemporary community standards,* the *dominant theme* of the material taken as a whole appeals to the prurient interest. (Emphasis supplied.) It is to be noted that in the *Jacobellis* case, decided on June 22, 1964, 32 L.W. 4652, that it is incorrect to read the section in the *Roth* rule to mean the standards of a particular local community or even a state. The Court considered that it was an "intolerable consequence" that "some sections of the country (could have)

access to material there deemed acceptable, which in others [fol. 118] might be considered offensive to prevailing community standards of decency." Constitutional status of allegedly obscene materials must be determined on a national standard.

15. In *Manuel Enterprises Inc.* v. *Day,* 370 U.S. 478, the United States Supreme Court, in an opinion written by Mr. Justice Harlan, made it clear that obscenity is not to be determined solely by the appeal to the prurient interest formulated in the *Roth* case. *Manuel Enterprises* holds that, in addition to the "prurient interest test", it is necessary to prove that the challenged material is also "patently offensive" as judged by current community standards of decency. In the *Manuel Enterprises* case—one involving magazines published for the homosexual market and distributed through the mails—Mr. Justice Harlan said that an erroneous view of obscenity "stemmed from the belief that in *Roth* v. *United States,* 354 U.S. 476, 489, this Court established the following *single* test for determining whether the challenged material is obscene: 'whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interests' ". Later he stated in the opinion: "The Court of Appeals . . . was mistaken in considering that *Roth* made "prurient interest' appeal the sole test of obscenity." (370 U.S. 478, 486) The additional test imposed by the *Manuel Enterprises* case was stated therein as follows:

> "These magazines cannot be deemed offensive on their face so as to affront current community standards of decency . . . a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency'. Lacking that quality, the magazines cannot be deemed legally 'obscene' and we need not consider the question of the proper 'audience' by which their 'prurient interest' appeal should be judged."

16. What is commonly called a third test in determining whether material challenged as obscene is entitled to constitutional protection is referred to as the "social value" test. In *Roth,* re-emphasized in *Jacobellis,* the United States Supreme Court ruled that "obscenity is excluded from constitutional protection only because it is utterly [fol. 119] without social importance" and that "the portrayal of sex, e.g. in art, literature and scientific works, is not in itself sufficient reason to deny material the constitutional protection of freedom of speech and press." And the Court in the *Jacobellis* case held that

> "(I)t follows that material dealing with sex in a manner that advocates ideas . . . or that has literary or scientific or artistic value or any other form of social importance may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance. See *Zeitlun* v. *Arnebergh,* 59 Cal. 2nd 901. It should also be recognized that the *Roth* standard requires in the first instance that the material 'goes substantially beyond customary limits of candor in description and representation in such matters. . . . In the absence of such a deviation from society's standards of decency, we do not see how any official inquiry into allegedly prurient appeal of a work of expression can be squared with the guaranties of the First and the Fourteenth Amendments. . . . "

The majority of the Court in *Attorney General* v. *"Tropic of Cancer",* 345 Mass. 11, 16 (cited in the support of this ruling in the *Jacobellis* case) said: "We think that in the light of the decisions reviewed above, that the First Amendment protects material which has value because of ideas, news or artistic, literary or scientific attributes."

17. The Attorney General must, therefore prove three elements or tests to maintain this petition: *First,* the "prurient interest" test, which, because of the holding in the *"Tropic of Cancer"* (345 Mass. 11) case must be shown to be "hard core pornography"; *Second,* the "patent offensiveness" test; and *Third,* the "social value" test. Failure of proof to sustain the standards that any one of these tests is designed for will result in an adjudication that the book cannot be held obscene in a constitutional sense. *Manuel Enterprises Inc.* v. *Day,* 370 U.S. 478.

[fol. 120] 18. The standards or "tests" as set forth in the preceding sections are to be applied to this book, "Memoirs of a Woman of Pleasure." The book tells of a young girl, Fanny Hill, born in a small village near Liverpool of poor parents, who died when she was fifteen years of age. She came to London seeking household work and in an employment office met the mistress of a bawdy house. These events take ten pages of the book to relate and from then on, in the remaining 210 pages,—in the words of Chief Justice Desmond in his dissenting opinion in *Larkin* v. *G. P. Putnam's Sons,* (New York Court of Appeals, decided on July 10, 1964)—the book depicts "to the last intimate physical detail numerous instances not only of prostitution, but of voyeurism, transvestism, homosexuality, Lesbianism, flogging, seduction of a boy, etc., etc." "Indeed" wrote Chief Justice Desmond, "the book is pornography in the strictest philological and etymological sense of the word since it is, quite literally, the narration by a prostitute of the particulars of her trade." "Memoirs" is essentially an uninterrupted series of minutely detailed descriptions of sexual adventures which are described by Mr. Justice Marks in *Larkin* v. *G. P. Putnam's Sons,* 213 N.Y.S. 2nd, 146, 147 "as Lesbianism, female masturbation, the deflowering of a virgin, the seduction of a male virgin, the flagellation of male by female and female by male, and aberrant acts as well as more than twenty acts of sexual intercourse between man and female, some of which are committed in the

open presence of numerous other persons and some of which are instances of voyeurism . . . and further in the book, the four girl companions of Fanny Hill who are residents in the same bawdy house are asked to narrate the circumstances of their loss of virginity which they proceed to do in lurid detail, the obvious intent being to glorify the deflowering of young girls." Having read the book four times in the preparation of this decision, I quite agree with the accuracy of the above descriptions, but there are other kinds of sexual debauchery also described such as two kinds of unnatural acts, erotic acts and orgiastic exhibitions of sexual excesses. The book intimately describes in a continuous sequence one sexual adventure after another of the types above described mortised together with short transitory passages which simply set the stages for the recital of the ensuing sex adventures. Its evident purpose is to sexually arouse its readers and keep them aroused. Of the 214 pages in the book, 42 of them—including the first ten pages telling about her life before she arrived at the bawdy house, [fol. 121] are pages not devoted to descriptions of sex adventures, but even in the 32 pages composing the transitional passages there are smutty references. This "book is pitched at the nadir of scatology" to use Chief Justice Wilkins' now famous phrase in the *"Tropic of Cancer"* case, 345 Mass. 11 at 22. Its dominant theme as a whole appeals to the prurient interest. It is pornography and "hard core" pornography at that—the kind described in section 14 of this report.

19. The *Roth* rule requires that a challenged publication to be branded obscene and denied constitutional protection, must be shown to be material which "to the average person, applying *contemporary community standards,* the dominant theme of the material taken as a whole appeals to the prurient interest." (Emphasis supplied.) As early as March 31, 1772, "Memoirs" was called a "licentious and inflaming book" than by no less a critic than James Boswell writing in his diary. In 1821, the papers in the case of *Commonwealth* v. *Holmes,* 17 Mass. 335 called the book

"Memoirs of a Woman of Pleasure" such a "lewd, wicked and obscene" publication "that the same would be offensive to the Court and improper to be placed in the court records." The intervener, the publisher, tells in the introduction of the present edition that this book is "a frankly erotic novel", first published about 1749 and "in constant, but for the most part, surreptitious, circulation ever since." And Chief Justice Desmond in his dissenting opinion in the *Larkin* v. *G. P. Putnam's Sons* case, decided on July 10, 1964, wrote that for centuries, "Memoirs of a Woman of Pleasure" (Fanny Hill) "has been cited throughout the world as the very prototype and archetype of obscenity, 'the pornographic best seller of all time' (Loth, 1961, The Erotic in Literature, p. 31). . . . " The *Roth* rule requires the determination of what judgment average persons, applying *contemporary* community standards, would make of the book, taken as a whole, insofar as appealing to the prurient interests: and the *Jacobellis* case ruled that what was meant by "contemporary community standards" were the standards of a nation and not of a particular locality, even a state. Judgment on that element can only be made on a judge's knowledge, gained from education and experience, reading decisions of courts throughout the country and accompanying case records, all the matter submitted by way of exhibits and expert testimony at the trial, and general [fol. 122] knowledge obtained from books, magazines, periodicals, viewing motion pictures and television programs and all other information media. It has been my good fortune—in addition to experience as a newspaper man and a practising attorney,—to be a judge for sixteen years, in eight of which, as a Judge of Probate, I heard hundreds of divorce and domestic relations cases involving sexual adventures of many kinds: and, as a Justice of the Superior Court, I heard in the criminal court as well as in civil cases many matters involving like adventures and obscenity. I venture to say that no better knowledge of the moral standards and the sexual practices and beliefs of ordinary people can be obtained than in the trials of sex

cases. No one can deny that since the First World War that the literature of this nation involving descriptions of sexual episodes and experiences are becoming more and more the fashion. No better evidence of this can be given than to review the avalanche of obscenity cases that have streamed into the courts in the last thirty years and the recorded dissensions between the forces striving for public decency and the purveyors of sexual filth. It is a common saying that a novel will not sell well without recitals of sexual adventures. Sex and sexual practices and perversions have been the subject of thought of all persons since the dawn of humanity and standards of sexual decency have varied from generation to generation. There can be no question that these standards throughout the country have lowered in our present lifetime and that the moral standards of the average person in relation to sexual relations are quite different and lower than in the Victorian age. The Court has not only studied the sex-concerned books, magazines and newspaper articles submitted as exhibits at the trial and in connection with the briefs counsel filed, but also has studied many other books and periodicals as well. The Court has considered the book as a whole and has considered its impact upon average persons throughout the United States and finds that it is such "hard core" pornography appealing to the prurient interests that it is not only "obscenity" as defined in *Roth* v. *United States,* 354 U.S. 476, 484 and *Attorney General* v. *"Tropic of Cancer",* 345 Mass. 11, but it is also "patently offensive" as that term is used in *Manuel Enterprises Inc.* v. *Day,* 370 U.S. 478. It goes far beyond and substantially beyond customary limits of candor and makes persistent appeals to shameful and morbid interests in prolonged, detailed and florid descriptions of sexual activities.

[fol. 123] 20. The repeated and repeated intimate and detailed portrayals of pornographic episodes are so dominant in this book that it is "utterly without redeeming social importance." (354 U.S. 489.) It is urged by the intervener that this book contains no four letter words as used in

"Tropic of Cancer" and is well written. College professors of English submitted opinions as experts as to the claimed literary or non-literary worth of the book. As has been related, opinions in book review articles and photostatic copies of newspaper articles involving opinions concerning the worth of the book in various aspects were admitted into evidence on this issue of social value. "Opinions and views of experts do reflect responsible views in the social community which any forward-looking court ought to take into account." *People* v. *Richmond County News,* 9 N.Y. 2nd at 584. And they have been taken into account. The opinions of English professors, authors and critics, however, no matter how distinguished they may be, cannot be substituted for those of average persons in the contemporary national community. Opinions of experts are admitted in evidence to aid the Court in its understanding and comprehension of the facts, but, of course, an expert cannot usurp the function of the Court. Highly artificial, stylistic writing and an abundance of metaphorical descriptions are contained in the book but the conclusions of some experts were pretty well strained in attempting to justify its claimed literary value: such as the book preached a moral that sex with love is better than sex without love, when Fanny's descriptions of her sexual acts, particularly with the young boy she seduced, in Fanny's judgment at least, was to the contrary. Careful review of all the expert testimony has been made, but, the best evidence of all, is the book itself and it plainly has no value because of ideas, news or artistic, literary or scientific attributes. *Attorney General* v. *"Tropic of Cancer"*, 345 Mass. 11 at 16. Nor does it have any other merit. "This Court will not adopt a rule of law which states obscenity is suppressible but well written obscenity is not." Mr. Justice Scileppi in *People* v. *Fritch,* 13 N.Y. 2d 119. No "weighing" of any of its alleged social importance against its prurient interest appeal is needed. "Hard core" pornography has no literary merit or social value. *Attorney General* v. *"Tropic of Cancer"*, 345 Mass. 11, 15, footnote 5. It is concluded that this book is "utterly without redeeming social importance" in the fields of art, literature,

[fol. 124] science, news or ideas of any social importance and that it is obscene, indecent and impure.

21. On July 10, 1964, this same book, "Memoirs of a Woman of Pleasure" was held by a four to three decision of the Court of Appeals of the State of New York to be entitled to the constitutional protection of the First Amendment. Vigorous dissents were filed by the Chief Justice and Mr. Justice Scileppi and the latter wrote in his dissent: "If this classic example of pornography (referring to "Memoirs") is not obscene, then I doubt if any written matter can be found obscene." I agree.

Order for Final Decree

A final decree may be entered that the book entitled "John Cleland's Memoirs of a Woman of Pleasure" commonly known as "Fanny Hill" is not entitled to the protection of the First Amendment to the United States Constitution and that the Court, finding that the said book is obscene, indecent and impure, it is adjudicated obscene, indecent and impure under the provisions of General Laws, c. 272, §§ 28C, 28E and 28F as amended by St. 1945, c. 278.

Donald M. Macaulay, Justice of the Superior Court.

Final Decree—Entered September 17, 1964

This cause came on to be further heard, and was argued by counsel; and thereupon, upon consideration thereof, it is Ordered, Adjudged and Decreed that the book named "John Cleland's Memoirs of a Woman of Pleasure", commonly known as "Fanny Hill", is obscene, indecent and impure under the provisions of G. L. c. 272, §§ 28C, 28E and 28F, as amended by St. 1945, c. 278.

[fol. 125] And it is further Ordered, Adjudged, Declared and Decreed that the above-named book is not entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States against action by the

Attorney General or other law enforcement officer pursuant to the provisions of G. L. c. 272, § 28B, or otherwise.

September 16, 1964. This decree may be entered.

Donald M. Macaulay, Justice of Superior Court.

By the Court, (Macaulay, J.),
Thomas F. Stanton, Ass't Clerk

CLAIM OF APPEAL OF INTERVENER, G. P. PUTNAM'S SONS—Filed September 18, 1964

Now comes the intervener, G. P. Putnam's Sons, and being aggrieved by the Final Decree entered herein on September 17, 1964, hereby appeals from said Decree to the Supreme Judicial Court.

By its Attorneys, Reuben Goodman, Charles Rembar.

[fol. 126]

CERTIFICATE AND ORDER OF TRIAL JUDGE AS TO EXHIBITS UNDER FULL COURT RULE 6

In the above-entitled proceedings, in which the evidence is reported, certain exhibits were introduced in evidence before me. After hearing the parties I certify, under Rule 6 of the Full Court, that the reproduction of the exhibits in the record would entail burdensome and unwarranted expense or would be impracticable.

I order that the exhibits need not be reproduced in the printed record but that they shall be preserved by the clerk of this court and that they shall be transmitted to the clerk of the Full Court of the Supreme Judicial Court, to be presented to that court at the time of argument or of submission on briefs.

Ex. A Paperback book entitled "Fanny Hill", John Cleland's Memoirs of a Woman of Pleasure

Ex. B June 21, 1963, issue of "Life Magazine"

Ex. C Photocopy of page 5, "Boston Record-American" for July 1, 1963

Ex. D Photocopies of pages 3 and 25, "Boston Record-American" for July 23, 1963

Ex. E Photocopies of pages 3 and 33, "Boston Record-American" for July 25, 1963

Ex. F Photocopies of pages 3 and 4, "Boston Record-American" for June 29, 1963

Ex. G Photocopy of page 10, "Boston Globe" for July 25, 1963

Ex. H Photocopy of page 13, "Boston Traveler" for July 23, 1963

[fol. 127] Ex. I Photocopy of page 12, "Boston Traveler" for July 23, 1963

Ex. 1 Photostatic copy of page 2, The New York Times Book Review, July 28, 1963, containing column entitled "Speaking of Books" by J. Donald Adams

Ex. 2 Article entitled "The Harlot's Progress" by V. S. Pritchett from October 31, 1963, edition of the "New York Review of Books"

Ex. 3 Article entitled "Mersey Sound 1750" by Brigid Brophy from November 15, 1963, issue of "New Statesmen"

Ex. 4 Item bearing sub-heading "Taste" under the heading "Modern Living" from August 2, 1963, issue of "Time Magazine"

The listed exhibits are all the exhibits in this case.

Donald M. Macaulay, Justice of the Superior Court.

Assented to:

Reuben Goodman, for Intervener-Appellant.

John E. Sullivan, Assistant Attorney General, for Plaintiff-Appellee.

September 22, 1964.

[fol. 129]

IN THE SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH OF MASSACHUSETTS

ATTORNEY GENERAL,

vs.

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE."

OPINION—April 22, 1965

SPALDING, J. This is an appeal from a final decree holding the book, "John Cleland's Memoirs of a Woman of Pleasure" (Memoirs), more commonly known as "Fanny Hill," obscene, indecent and impure under G. L. c. 272, §§ 28C, 28E, and 28 F (inserted by St. 1945, c. 278, § 1).[1] The petition was brought by the Attorney General. The publisher of the book, G. P. Putnam's Sons, intervened as a party. No jury trial having been claimed under § 28D, the case was heard by a judge. The evidence consisted of the book, various newspaper articles, book reviews and the testimony of several experts in the field of literature. The

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[1] Section 28C reads, in relevant part, "Whenever there is reasonable cause to believe that a book which is being imported, sold, loaned or distributed . . . is obscene, indecent or impure, the attorney general . . . shall bring an information or petition in equity . . . directed against said book by name." Then follows a provision relating to a "reasonable cause" hearing, notice to interested persons, and an interlocutory adjudication. Section 28E provides for an adjudication against the book, in the event of default, "if the court finds that the book is obscene, indecent or impure . . . ." Section 28F provides for a contested hearing. "At such hearing the court may receive the testimony of experts and may receive evidence as to the literary, cultural or educational character of said book and as to the manner and form of its publication, advertisement, and distribution."

judge made careful and complete findings of fact and discussed the relevant law exhaustively.

[fol. 131] Memoirs was written in England in 1749. For over two centuries it has had for the most part a surreptitious circulation. Memoirs has, for example, previously been a source of litigation in this Commonwealth (see *Commonwealth* v. *Holmes,* 17 Mass. 336), and very recently it has been the subject of decisions by other courts. See *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399; *G. P. Putnam's Sons* v. *Calissi,* 86 N. J. Super. 82.

The sole question is whether the publication of Memoirs is protected by the First Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment. Since a majority of the court held in *Roth* v. *United States,* 354 U. S. 476, 485, "that obscenity is not within the area of constitutionally protected speech or press," the question becomes one of determining whether or not Memoirs is obscene.

The book takes the form of two letters written by a prostitute in which she recounts her life since she, a country girl, was abandoned in London. It concentrates on her sexual experiences, both normal and abnormal, which are described in minute detail. Memoirs, as is conceded by the intervener, is erotic. Erotica and obscenity, however, are not synonymous. The fact that Memoirs may arouse sexual thoughts and desires is not, in itself, sufficient to deprive it of its constitutional protection. If the contrary were the case, the public could be deprived of many of the world's greatest literary and artistic works. Our task, then, is to trace, as best we can, the "dim and uncertain line" which separates [fol. 133] obscenity from that which is protected by the First Amendment. See *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 66; *Jacobellis* v. *Ohio,* 378 U. S. 184, 187. We are under no illusions as to the difficulties involved in "facing up to the tough individual problems of constitutional judgment involved in every obscenity case." *Roth* v. *United States,* 354 U. S. 476, 498.

The first Supreme Court case to face the obscenity issue squarely was *Roth* v. *United States,* 354 U. S. 476.[1] The majority opinion in that case established the following test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489. In a footnote the majority clarified what their notion of "prurient" was by quoting with approval Am. Law. Inst., Model Penal Code, § 207.10 (2) (Tent. draft, No. 6, 1957) which defined that term as ". . . a shameful or morbid interest in nudity, sex, or excretion." [2] *Roth* v. *United States, supra,* at 487, n. 20.

We have no doubt that the dominant theme of Memoirs appeals to prurient interest. The book is composed almost [fol. 135] entirely of a series of episodes involving Lesbianism, voyeurism, prostitution, flagellation, sexual orgies, masturbation, fellatio, homosexuality, and defloration, all of which "goes substantially beyond customary limits of candor in describing or representing such matters." Am. Law Inst., Model Penal Code, § 251.4 (1) (Proposed Official Draft, May 4, 1962). See *Jacobellis* v. *Ohio,* 378 U. S. 184, 191. For the same reason, we hold Memoirs to be such an affront to current community standards as to constitute "patent offensiveness." See *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 482. We would reach this result whether we applied local community or national standards. See *Jacobellis* v. *Ohio, supra,* at 193 (opinion of Brennan, J.), which indicates national standards should be used. But see dissent of Warren, C.J., in that case at page 200, which takes the position that obscenity is to be defined by local community standards.

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[1] This case, as well as all but the most recent authority, is fully discussed in *Attorney Gen.* v. *"Tropic of Cancer,"* 345 Mass. 11. We need not, therefore, elaborate upon the general development of this area of the law.

[2] The same definition of "prurient" has been adopted by Am. Law. Inst., Model Penal Code, § 251.4 (1) (Proposed Official Draft, May 4, 1962).

There is one other possible test which must be considered. The majority opinion in the *Roth* case went on to say that "implicit in the history of the First Amendment is the rejection of obscenity as *utterly without redeeming social importance*" (emphasis supplied). *Id.* at p. 484. While it does not clearly emerge from the opinion whether "social importance" is an independent standard, subsequent decisions shed some light on the matter.

In *Jacobellis* v. *Ohio, supra,* 191 (opinion of Brennan, J., concurred in by Goldberg, J.), the view was expressed that the constitutional status of material cannot "be made to [fol. 137] turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance." See *Tralins* v. *Gerstein,* 378 U. S. 576 (per curiam), and *Grove Press, Inc.* v. *Gerstein,* 378 U. S. 577 (per curiam). Thus it would appear that unless a work is "utterly without social importance" it cannot be deemed obscene. For views which would extend the constitutional protection even further see *Roth* v. *United States,* 354 U. S. 476, 508 (dissent of Douglas, J.); *Jacobellis* v. *Ohio,* 378 U. S. 184, 196 (opinion of Black, J.); *A Quantity of Books* v. *Kansas,* 378 U. S. 205, 213 (opinion of Black, J.).

The trial judge, after an exhaustive and able discussion of the relevant decisions, ruled that the Attorney General, to maintain his petition, must meet the following three tests: *"First,* the 'prurient interest' test, which, because of the holding in the *'Tropic of Cancer'* (345 Mass. 11) case must be shown to be 'hard core pornography'; *Second,* the 'patent offensiveness' test; and *Third,* the 'social value' test." He further ruled that the "[f]ailure . . . to sustain the standards that any one of these tests is designed for will result in an adjudication that the book . . . [is not] obscene in a constitutional sense." Whether the Supreme Court of the United States has laid down three independent standards, all of which (as the judge ruled), must be satisfied, need not be decided, for in our opinion Memoirs

[fol. 139] meets all the tests.[1] As indicated above, we have little doubt that Memoirs' dominant theme appeals to prurient interests and that it is patently offensive.

It remains to consider whether the book can be said to be "utterly without social importance." We are mindful that there was expert testimony, much of which was strained, to the effect that Memoirs is a structural novel with literary merit; that the book displays a skill in characterization and a gift for comedy; that it plays a part in the history of the development of the English novel; and that it contains a moral, namely, that sex with love is superior to sex in a brothel. But the fact that the testimony may indicate this book has some minimal literary value does not mean it is of any social importance. We do not interpret the "social importance" test as requiring that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene. Upon a consideration of all the evidence, including the book, we are of opinion that Memoirs is not endowed with constitutional protection.

We have not overlooked the fact that Memoirs was recently held not to be obscene in the constitutional sense by a closely divided court in *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399. But the Superior Court of New Jersey in a well considered opinion has reached a contrary conclusion with respect to this book in *G. P. Putnam's Sons* v. *Calissi,* 86 N. J. Super. 82. We find the reasoning in that decision and the opinions of the dissenting judges in the *Larkin* case more persuasive.

It follows that the entry must be

Decree affirmed.

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[1] A fourth criterion, which involves determining whether material is hard core pornography, has been suggested. See *Jacobellis* v. *Ohio, supra,* pp. 184, 197 (opinion of Stewart, J.); *Attorney Gen.* v. *"Tropic of Cancer,"* 345 Mass. 11, 19. But the Supreme Court has never so held.

[fol. 141] WHITTEMORE, J. (dissenting, with whom Spiegel, J., joins) This book cannot be ruled to be "utterly without redeeming social importance." *Roth* v. *United States,* 354 U. S. 476, 484. *Jacobellis* v. *Ohio,* 378 U. S. 184, 191.

In the view of one or another or all of the following viz., the chairman of the English department at Williams College, a professor of English at Harvard College, an associate professor of English literature at Boston University, an associate professor of English at Massachusetts Institute of Technology, and an assistant professor of English and American literature at Brandeis University, the book is a minor "work of art" having "literary merit" and "historical value" and containing a good deal of "deliberate, calculated comedy." It is a piece of "social history of interest to anyone who is interested in fiction as a way of understanding society in the past." [1] A saving grace is that although many scenes, if translated into the present day [fol. 143] language of "the realistic, naturalistic novel, could be quite offensive" these scenes are not described in such language. The book contains no dirty words and its language "functions . . . to create a distance, even when the sexual experiences are portrayed." The response, therefore, is a literary response. The descriptions of depravity are

[1] One of the witnesses testified in part as follows: "Cleland is part of what I should call this cultural battle that is going on in the 18th century, a battle between a restricted Puritan, moralistic ethic that attempts to suppress freedom of the spirit, freedom of the flesh, and this element is competing with a freer attitude towards life, a more generous attitude towards life, a more wholesome attitude towards life, and this very attitude that is manifested in Fielding's great novel 'Tom Jones' is also evident in Cleland's novel. . . . [Richardson's] 'Pamela' is the story of a young country girl; [his] 'Clarissa' is the story of a woman trapped in a house of prostitution. Obviously, then, Cleland takes both these themes, the country girl, her initiation into life and into experience, and the story of a woman in a house of prostitution, and what he simply does is to take the situation and reverse the moral standards. Richardson believed that chastity was the most important thing in the world; Cleland and Fielding obviously did not and thought there were more important significant moral values."

not obscene because "they are subordinate to an interest which is primarily literary"; Fanny's reaction to the scenes of depravity was "anger," "disgust, horror [and], indignation." The book "belongs to the history of English literature rather than the history of smut." [2]

The book, according to its publisher, has been purchased by a considerable number of college libraries including the Harvard and Massachusetts Institute of Technology libraries.

It is not the court's function to consider whether to agree or disagree with the appraisal of the book by academic witnesses. The controlling circumstance is that the work is evaluated by representative scholars and teachers of English literature as a work of some literary and historical significance notwithstanding its patently pornographic aspects. I construe the concept embodied in the term "social importance" as used by the United States Supreme Court to include the literary and historical field. Hence, I be- [fol. 145] lieve that the publication of this book is protected by the First Amendment as expounded in the Supreme Court decisions. *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399.

I assume that the book would be offensive to some, perhaps a great many, readers. So are numerous other books now published that use four letter words freely, portray sexual encounters explicitly and with a detail of description far beyond anything used by Cleland, and often appear intended to degrade and debase the sexual relationship. A purpose of some such books appears to be the destruction of concepts deemed basic to the existing social and moral order. If the measure intended by the *Roth* case, *supra,* were of possible effect on prevailing values, books like "Tropic of Cancer" would, I submit, be banned. But on such a scale "Fanny Hill" appears of slight, if any, weight

[2] In the opinion of the other academic witness, the headmaster of a private school, whose field is English literature, the book is without literary merit and is obscene, impure, hard core pornography, and is patently offensive.

and not worth the attention that efforts to ban inevitably bring. I agree with the opinion in the *Larkin* case, *supra,* that "[i]t is unlikely 'Fanny Hill' can have any adverse effect on the sophisticated values of our century." 14 N. Y. 2d 399, 403-404.

Freedom to read, as I construe it, means that such a book as this is to be available to those who wish to read it and that the persisting urge of others to bar its publication is effectively restrained. There is, of course, no obligation upon any member of the general public to read this book.

[fol. 147] CUTTER, J. (dissenting) I disagree with the majority opinion for reasons in part somewhat different from those stated by Mr. Justice Whittemore and Mr. Justice Spiegel.

The book seems to me offensive and unpleasant in numerous respects. In my opinion, it could reasonably be found that distribution of the book to persons under the age of eighteen would be a violation of G. L. c. 272, § 28,[1] as tending to corrupt the morals of youth. Despite the propensity of some young people to regard forbidden territory as a challenge to its exploration, it is not for the courts to determine whether it is wise to seek to prevent sale of such a book to persons under eighteen. I perceive no constitutional obstacle to treating as a criminal offence the sale of this book to persons under eighteen.[2]

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[1] Section 28 (as amended through St. 1959, c. 492, § 1), reads in part as follows: "Whoever sells or . . . publishes for the purpose of selling or distributing, to a person under the age of eighteen years a book . . . which is obscene . . . or manifestly tends to corrupt the morals of youth . . . shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not . . . more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction. In order to obtain a conviction under this section, it shall not be necessary to prove that the book . . . has been adjudged to be obscene . . . under the provisions of" §§ 28C to 28H.

[2] This, as a practical matter, might cause some booksellers to refuse to sell the book to persons recognizable as minors and to

[fol. 149] It is quite another thing effectually to prohibit sale of the book to all adults in Massachusetts by declaring the book to be obscene. This proceeding presents much the same substantive question involved in *Butler* v. *Michigan*, 352 U. S. 380, 382-384. There the Supreme Court of the United States held that Michigan could not prevent the sale to adults of a book which might "have a potentially deleterious influence upon youth." Michigan then argued that it was promoting the public welfare "by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence." Mr. Justice Frankfurter wisely said of this argument, "Surely, this is to burn the house to roast the pig. . . . [The] legislation [is] not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society." Here the effort is so to apply the provisions of c. 272, §§ 28C-28H, as amended (see also §§ 28, 28A, and 28B), as to deprive adults of the opportunity to read written material which, in the opinion of some members of the academic community, has some historical, literary, sociological, or entertainment interests. Although the book seems to me pretty sorry material, there is no accounting [fol. 151] for tastes. It is irrelevant that the taste of those who wish to read this tawdry writing seems deplorable to

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be somewhat cautious about its distribution. See Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 84-87. Although no declaration was expressly sought that sale of the book might be a violation of § 28, a determination that the book may not be sold to certain minors is a lesser form of relief which may be reasonably regarded as included in the greater equitable relief asked for under § 28C.

judges, or to prosecutors, or to persons of conventional habits, or to volunteer guardians of the morals of other adults. Although this book appears to me to have substantially less literary excuse than the book discussed in *Attorney Gen.* v. *"Tropic of Cancer,"* 345 Mass. 11, it cannot be said to be "utterly without redeeming social importance." As I read the recent United States decisions, they declare in effect (if not in words) that to justify literary censorship there must be absent any form of worth. See *Jacobellis* v. *Ohio,* 378 U. S. 184, 191-192.

I would (a) limit the relief granted to a declaration that distribution of this book to persons under the age of eighteen may be found to constitute a violation of c. 272, § 28, if that section is reasonably applied, and (b) expressly declare that, in view of the First Amendment, the book cannot be adjudged "obscene" in the sense in which that term has been used in recent constitutional decisions of the Supreme Court of the United States.

[fol. 154] Reporter's Certificate to foregoing paper (omitted in printing).

[fol. 155]

IN THE SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH OF MASSACHUSETTS

In the case of

ATTORNEY GENERAL,

vs.

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE."

pending in the Superior Court for the County of Suffolk.

JUDGMENT—RESCRIPT—April 22, 1965

Ordered, that the following entry be made in the docket; viz.,—

Decree affirmed.

By the Court,
Richard A. McLaughlin, Clerk.

April 22, 1965.

[fol. 156] Brief Statement of the Grounds and Reasons of the Decision:

See opinion on file.

[fol. 159]

IN THE SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH OF MASSACHUSETTS

DOCKET ENTRIES

Equity No. 6543

ATTORNEY GENERAL,

vs.

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE."

Counsel for Plaintiff:

Attorney General, Walter J. Skinner; William I. Cowin, John E. Sullivan, Asst. Attorneys General.

Counsel for Defendant:

Widett & Kruger, Reuben Goodman, Charles Rembar.

Suffolk Superior Intervener's Appeal

Entered October 5, 1964.

December 2, 1964. Motion of Civil Liberties Union and others for leave to file brief as amici curiae.

December 3, 1964. Motion allowed by the Court.

Argued January 8, 1965.

April 22, 1965. Decree affirmed.

Rescript April 22, 1965.

Reasons as on file.

[fol. 161]

IN THE SUPERIOR COURT WITHIN AND FOR
COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS
No. 82126 Eq.

EDWARD W. BROOKE, Attorney General,

v.

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", (commonly known as Fanny Hill).

FINAL DECREE AFTER RESCRIPT—Entered June 10, 1965

This cause came on at this sitting after rescript from the Supreme Judicial Court and, pursuant to said rescript, it is Ordered, Adjudged and Decreed that the book named "John Cleland's Memoirs of a Woman of Pleasure", commonly known as "Fanny Hill", is obscene, indecent and impure under the provisions of G. L. c. 272, §§ 28C, 28E and 28F, as amended by St. 1945, c. 278.

And it is further Ordered, Adjudged, Declared and Decreed that the above-named book is not entitled to the protection of the First and Fourteenth Amendments to the [fol. 163] Constitution of the United States against action by the Attorney General or other law enforcement officer pursuant to the provisions of G. L. c. 272, § 28B, or otherwise.

By the Court, (Kalus, J.),
Thomas F. Brophey, Asst. Clerk.

Entered June 10, 1965

[fol. 167]

IN THE SUPERIOR COURT WITHIN AND FOR

COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS

DOCKET ENTRIES

No. 82126 Eq.

EDWARD W. BROOKE, Attorney General,

vs.

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" (commonly known as Fanny Hill).

Plaintiffs:

Edward W. Brooke, Attorney General.

Plaintiffs Counsel:

Pro Se, Walter J. Skinner, Asst. Atty. General, State House, Boston 33.

3/19/64—William I. Cowin, Asst. Atty. General.

5/27/64—John E. Sullivan, Asst. Atty. General.

Defendants:

A Book named "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill), G. P. Putnam's Sons, Intvnr.

Defendants Counsel:

Reuben Goodman—Charles Rembar,
Widett & Kruger,
80 Federal St., Boston 10.

DATE	NO.	ENTERED:
1964		
Feb. 10	1	Petition.
Feb. 10	2	Opinion of Hudson, J. that there is reasonable cause to believe that a book

DATE	NO.	ENTERED:
		named "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill), is obscene, indecent and impure, and order for issuance of order of notice.
Feb. 10	3	Order of notice returnable March 19, 1964. Copies issued.
Feb. 10 [fol. 169]	4	Order impounding the book "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill) named in the above petition and marked Exhibit A, until further order of Court.
Feb. 10	5	Plaintiff's motion for an interlocutory finding and adjudication, and allowed.
Feb. 10	6	Interlocutory findings and adjudication.
Mar. 19	7	ANSWER of G. P. Putnam's Sons, Intvnr.
Apr. 16	8	Plaintiff's motion to advance, allowed, etc.
Apr. 16	9	Order placing suit on list without jury, advanced section, for hearing May 27, 1964.
May 27	—	Trial 3rd Jury Session W. J. Macaulay, J.
May 27	10	Intervenor's request for report of evidence and designation of stenographer, and allowed.
May 27	11	Order designating Mary H. Kevill to report testimony to Supreme Judicial Court.

DATE	NO.	ENTERED:
Sept. 3	12	FINDINGS OF FACT, RULINGS OF LAW AND ORDER FOR FINAL DECREE, Macaulay, J. Notice sent.
Sept. 15	13	Transcript of Testimony. Notice sent.
Sept. 17	14	FINAL DECREE. Notice sent.
Sept. 18	15	Intervener's appeal.
Sept. 18	16	Joint designation.
Sept. 18	17	Intervener's order to Clerk for preparation of papers for Supreme Judicial Court.
Sept. 21	—	Notice sent Macaulay, J. and parties under Supreme Judicial Court Rule 2F as amended.
Sept. 22	18	Certificate of trial Judge in re: exhibits.
Sept. 22	19	Order approving joint designation, etc. Notice sent.
Sept. 22	—	Notice of estimate sent.
Sept. 23	—	Deposit for preparation of papers for Supreme Judicial Court.
[fol. 171]		
Sept. 24	—	Return receipt received re: notice of estimate.
Oct. 5	—	Notice record ready for Supreme Judicial Court sent.
Oct. 5	—	Record transmitted to Supreme Judicial Court.
1965		
Apr. 22	20	Rescript from Supreme Judicial Court, "Decree affirmed." Notice sent.
June 4	21	Plaintiff's motion for a final decree after rescript.

DATE	NO.	ENTERED:
June 10	—	Plaintiff's motion (p#21) allowed.
June 10	22	FINAL DECREE after Rescript. Notice sent.
June 15	23	Motion of G. P. Putnam's Sons, Intervenor to release all the exhibits including Exhibit A, the empounded paperback entitled "John Cleland's Memoirs of a Woman of Pleasure" for transmission to the Supreme Court of the United States as part of the record in the appeal of this case, and allowed.
June 21	24	Notice of appeal to the United States Supreme Court by G. P. Putnam's Sons, Intervenor.
June 23	—	Record Prepared and sent to United States Supreme Court.

Thomas Forgan, Clerk.

[fol. 173]

IN THE SUPERIOR COURT WITHIN AND FOR
COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS

No. 82126 Eq.

EDWARD W. BROOKE, Attorney General,

vs.

A Book Named "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" (Commonly Known as FANNY HILL).

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY G. P. PUTNAM'S SONS, INTERVENOR—
Filed June 21, 1965

I. Notice is hereby given that G. P. Putnam's Sons, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment (Rescript) of the Supreme Judicial Court for the Commonwealth of Massachusetts entered on April 22, 1965, affirming the Final Decree of the Superior Court for the County of Suffolk in this cause, and from the Final Decree after Rescript entered by said Superior Court pursuant thereto on June 10, 1965.

This appeal is taken pursuant to 28 U. S. C. Section 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

A. The entire printed record on appeal to the Supreme Judicial Court;

[fol. 175] B. The exhibits listed in said record (R-126/7); viz:

1. Ex. A Paperback book entitled "John Cleland's Memoirs of a Woman of Pleasure"

2. Ex. B June 21, 1963, issue of "Life Magazine"
3. Ex. C Photocopy of page 5, "Boston Record-American" for July 1, 1963
4. Ex. D Photocopies of pages 3 and 25, "Boston Record-American" for July 23, 1963
5. Ex. E Photocopies of pages 3 and 33, "Boston Record-American" for July 25, 1963
6. Ex. F Photocopies of pages 3 and 4, "Boston Record-American" for June 29, 1963
7. Ex. G Photocopy of page 10, "Boston Globe" for July 25, 1963
8. Ex. H Photocopy of page 13, "Boston Traveler" for July 23, 1963
9. Ex. I Photocopy of page 12, "Boston Traveler" for July 23, 1963
10. Ex. 1 Photostatic copy of page 2, The New York Times Book Review, July 28, 1963, containing column entitled "Speaking of Books" by J. Donald Adams
11. Ex. 2 Article entitled "The Harlot's Progress" by V. S. Pritchett from October 31, 1963, edition of the "New York Review of Books"
12. Ex. 3 Article entitled "Mersey Sound 1750" by Brigid Brophy from November 15, 1963, issue of "New Statesman"

[fol. 177] 13. Ex. 4 Item bearing sub-heading "Taste" under the heading "Modern Living" from August 2, 1963, issue of "Time Magazine";

C. The majority and dissenting opinions of the Supreme Judicial Court;

D. The Rescript of the Supreme Judicial Court;

E. The docket entries of the Supreme Judicial Court;

F. The Final Decree after Rescript;

G. The Notice of Appeal to the Supreme Court of the United States;

H. Docket entries of the Superior Court for the County of Suffolk; and

I. The Certificate of the Clerk of the Superior Court for the County of Suffolk.

III. The following question is presented by this appeal:

Whether Section 28C-H of Chapter 272 of the General Laws of Massachusetts, as applied to the book named "John Cleland's Memoirs of a Woman of Pleasure", are unconstitutional under the First Amendment of the United States Constitution as made applicable to the states by the Fourteenth Amendment of the United States Constitution.

Together with the following subsidiary questions, which are, among others, comprised within the foregoing general question:

(1) Whether the publication of a book is protected by the First and Fourteenth Amendments if it is not utterly without social importance within the meaning of *Roth* v. *United States* and *Alberts* v. *California*, 354 U.S. 476, and whether "John Cleland's Memoirs [fol. 179] of a Woman of Pleasure" is such a book.

(2) Whether the publication of a book is protected by the first and Fourteenth Amendments if it does not appeal predominantly to prurient interest within the meaning of *Roth* v. *United States* and *Alberts* v. *California*, 354 U.S. 476, and whether "John Cleland's Memoirs of a Woman of Pleasure", is such a book.

(3) Whether the publication of a book is protected by the First and Fourteenth Amendments if it is not patently offensive within the meaning of *Manual Enterprises, Inc.* v. *Day,* 370 U.S. 478, and whether "John Cleland's Memoirs of a Woman of Pleasure", is such a book.

By its Attorneys, Reuben Goodman, Charles Rembar.

Acknowledgment of Service and Stipulation

Edward W. Brooke, Attorney General, appellee herein, acknowledges service of the foregoing Notice of Appeal and [fol. 181] stipulates to the designation of the record as set out in Paragraph II thereof, waiving any rights to cross-designate.

Edward W. Brooke, Attorney General, By: William I. Cowin, Assistant Attorney General.

Dated: June 21, 1965

[fol. 184] [File endorsement omitted]

[fol. 185] Judge's certificate and Clerk's certificate thereto (omitted in printing).

[fol. 187] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 188]

SUPREME COURT OF THE UNITED STATES

No. 368, October Term, 1965

A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", G. P. PUTNAM'S SONS (INTERVENOR), Appellant,

v.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

APPEAL from the Supreme Judicial Court of the Commonwealth of Massachusetts.

ORDER NOTING PROBABLE JURISDICTION—
November 8, 1965

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.